TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 128.

THE SPERRY AND HUTCHINSON COMPANY, PLAINTIFF IN ERROR,

vs.

AIDA T. RHODES.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

FILED JANUARY 8, 1909.

(21,469.)

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 23, 1910.

a Court of Appeals of the State of New York.

AIDA T. RHODES, Plaintiff-Respondent,
against
THE SPERRY AND HUTCHINSON COMPANY, Defendant-Appellant.

Case on Appeal.

Thomas E. O'Brien, Attorney for Plaintiff-Respondent, 32 Liberty Street, New York City.
John Hall Jones, Attorney for Defendant-Appellant, 320 Broadway, New York City.
10-27-1908.

1 Court of Appeals of the State of New York.

AIDA T. RHODES, Plaintiff-Respondent,
v.
THE SPERRY AND HUTCHINSON COMPANY, Defendant-Appellant.

Statement.

This is an appeal to the Court of Appeals from an order and judgment of the Appellate Division of the Supreme Court, Second Department, affirming the final judgment of the Supreme Court, Kings County, in favor of plaintiff and against defendant, and the order denying defendant's motion for a new trial.

The above-entitled action was commenced by the service of summons and complaint on the 19th day of June, 1905. Defendant's answer was served on July 7th, 1905. The action came on for trial before Mr. Justice Marean, without a jury, at a Special Term for Trials of the Supreme Court, on the 7th day of December, 1905.

The Justice duly made his findings of fact and conclusions
2 of law, which said decision was filed in the Office of the Clerk of the County of Kings on the 14th day of December, 1905. An interlocutory judgment was entered upon said decision on the 14th day of December, 1905, in favor of plaintiff, restraining the defendant, its agents, etc., from using plaintiff's pictures or photographs for the purposes of trade or advertising, and sending the issue of damages to a jury to be assessed and granting plaintiff an extra allowance of 5% upon the damages as assessed. The defendant duly appealed from said interlocutory judgment and, after argument, the judgment was affirmed (114 App. Div., 22). The issue of damages was tried before Mr. Justice Betts and a jury on November 27th and 28th, 1906, and on November 28th, 1906, the jury returned a verdict in favor of plaintiff for $1,000. A final judgment was entered upon the decision of Mr. Justice Marean and the verdict of the jury on November 30th, 1906, in favor of plaintiff, enjoining the defendant, its agents, etc., from using plaintiff's

pictures or photographs for the purposes of trade or advertising, and for the sum of $1,230.61. An order denying defendant's motion for a new trial was entered in the Office of the Clerk of the County of Kings on November 14, 1906. Thereafter, defendant appealed to the Appellate Division from said final judgment and order, which, after argument the Appellate Division affirmed and an order affirming said judgment and order, and the judgment of affirmance entered thereon, *thereon* were entered in the office of the Clerk of the County of Kings on the 5th day of July, 1907. It is from the order affirming said judgment and order and from the judgment of affirmance entered thereon, that defendant has appealed.

3 The full name of the plaintiff is Aida T. Rhodes, and the full name of the defendant is The Sperry and Hutchinson Company. Thomas E. O'Brien appeared as attorney for plaintiff and John Hall Jones as attorney for defendant. There has been no change of parties or attorneys.

Notice of Appeal to Court of Appeals.

Court of Appeals of the State of New York.

AIDA T. RHODES, Plaintiff-Respondent,

v.

THE SPERRY AND HUTCHINSON COMPANY, Defendant-Appellant.

SIRS: Please take notice that The Sperry and Hutchinson Company, the above-named defendant, hereby appeals to the Court of Appeals of the State of New York from a judgment in favor of the plaintiff and against the defendant, entered in the office of the Clerk of the County of Kings, on the 5th day of July, 1907, for the sum of $94.64 costs, and affirming a final judgment in favor of the plaintiff and against the defendant, entered in the office of the Clerk of the County of Kings, on the 30th day of November, 1906, enjoining and restraining the defendant from using plaintiff's pictures or photographs for the purposes of trade or advertising

4 and for the sum of $1,230.61, and said defendant appeals from each and every part of said judgment.

Said defendant also appeals to said Court of Appeals from an order entered in the office of the Clerk of the County of Kings, on the 5th day of July, 1907, affirming said judgment entered in the office of the Clerk of the County of Kings on the 30th day of November, 1906, and said defendant appeals from each and every part of said order.

Dated, New York, July 11, 1907.

Yours, &c.,

JOHN HALL JONES,
Attorney for Defendant-Appellant.

320 Broadway, Borough of Manhattan, New York City.

To Thos. E. O'Brien, Esq., Attorney for Plaintiff-Respondent.
Charles T. Hartzheim, Esq., Clerk of the County of Kings.

5 Supreme Court, Kings County.

AIDA T. RHODES, Plaintiff,
v.
THE SPERRY AND HUTCHINSON COMPANY, Defendant.

Statement Under Rule 41.

The above entitled action was commenced by the service of a summons and complaint on the 19th day of June, 1905. Defendant's answer was served on July 7, 1905. The action came on for trial before Mr. Justice Marean without a jury at a Special Term for Trials of this Court on the 7th day of December, 1905. The Justice duly made his findings of fact and conclusions of law, which said decision was filed in the office of the Clerk of the County of Kings on the 14th day of December, 1905. An interlocutory judgment was entered upon the decision on the 14th day of December, 1905, in favor of plaintiff, restraining the defendant, its agents, etc., from using plaintiff's pictures or photographs for the purposes of trade, or advertising, and sending the issue of damages to a jury to be assessed and granting plaintiff an extra allowance of 5% upon the damages as assessed. The defendant duly appealed from said interlocutory judgment and after argument the judgment was
6 affirmed without opinion, 114 A. D., 22. The issue of damages was tried before Mr. Justice Betts and a jury on November 27th and 28th, 1906, and on November 28, 1906, the jury returned a verdict in favor of plaintiff for $1,000. The final judgment was entered upon the decision of Mr. Justice Marean and the verdict of the jury on November 30, 1906, in favor of plaintiff enjoining the defendants, its agents, etc., from using plaintiff's pictures or photographs for the purposes of trade or advertising, and for the sum of $1,230.61. The order denying defendant's motion for a new trial was entered herein on November 14, 1906.

The appeal in this case is from the final judgment and from the order denying a motion for a new trial. The full name of the plaintiff is Aida T. Rhodes, and the full name of defendant is The Sperry and Hutchinson Company.

Thomas E. O'Brien appeared as attorney for plaintiff, and John Hall Jones appeared as attorney for defendant. There has been no change of parties or attorneys.

7 *Notice of Appeal.*

Supreme Court, County of Kings.

AIDA T. RHODES, Plaintiff,
v.
THE SPERRY AND HUTCHINSON COMPANY, Defendant.

SIRS: Please take notice that the above named defendant, The Sperry and Hutchinson Company, hereby appeals to the New York

Supreme Court, Appellate Division, in and for the Second Department, from a judgment entered in the office of the Clerk of the Supreme Court, County of Kings, on the 30th day of November, 1906, in favor of the above named plaintiff, and against the above named defendant, for the sum of One thousand, two hundred and Thirty and 61/100 Dollars ($1,230.61), and said defendant appeals from each and every part of said judgment.

Said defendant also appeals to said Appellate Division of the Supreme Court from an order denying defendant's motion for a new trial entered in the office of the Clerk of the County of Kings on the 14th day of December, 1906, and said defendant appeals from each and every part of said order.

Dated, December 19, 1906.

Yours, etc.,

JOHN HALL JONES,
Attorney for Defendant.

320 Broadway, New York City, N. Y.

8 To Thomas E. O'Brien, Esq., Attorney for Plaintiff.
To Chas T. Hartzheim, Esq., Clerk of the Supreme Court, County of Kings.

Summons.

Supreme Court, Kings County.

AIDA T. RHODES, Plaintiff,
against
THE SPERRY AND HUTCHINSON COMPANY, Defendant.

To the above-named Defendant, summons:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated, June 19, 1905.

THOMAS E. O'BRIEN,
Plaintiff's Attorney.

Office & P. O. Address, No. 21 Cortlandt St., New York City.

9 *Complaint.*

Supreme Court, Kings County.

AIDA T. RHODES, Plaintiff,
against
THE SPERRY AND HUTCHINSON COMPANY, Defendant.

The plaintiff, by Thomas E. O'Brien, her attorney, for a complaint against the defendant alleges:

I. That she is now and at all the times hereinafter mentioned was of the age of twenty-one years and upwards.

II. That the defendant is a foreign corporation organized under the laws of the State of New Jersey.

III. That defendant is engaged in the business of issuing and redeeming trading stamps and has a branch office at No. 152 West 23rd street, in the Borough of Manhattan, the City of New York.

IV. That on or about the 15th day of January, 1905, the defendant publicly, knowingly and without the consent of the plaintiff, in writing or otherwise, used and displayed in its branch office
10 above mentioned three pictures or photographs of the plaintiff, one in a show case at the side of said office and one in each of two wall cabinets. That the sole purpose of the defendant in so using and displaying plaintiff's pictures or photographs was to advertise the benefits conferred on the holders of trading stamps issued and redeemed by defendant, and to acquire a larger trade and custom thereby. That the defendant repeatedly represented said pictures or photographs as types of those obtainable for a certain number of defendant's trading stamps and called special attention thereto.

VI. On information and belief, that defendant continuously used and exhibited said three pictures or photographs of plaintiff in the manner and for the purpose aforesaid on every business day after the date of the above-mentioned first exhibition until on or about the 10th day of March, 1905.

VII. That on or about said 10th day of March, 1905, plaintiff requested and demanded of defendant that it cease to exhibit and use said pictures or photographs of plaintiff, and defendant promised to cease to use and exhibit them forthwith.

VIII. On information and belief, that defendant, despite plaintiff's said request and demand, has never ceased using and displaying one of said pictures or photographs, and still continues to use and exhibit the same in a prominent place in a wall cabinet at said branch office in the manner and for the purpose aforesaid, in utter defiance of plaintiff's wishes in that regard.

IX. That by reason of said knowing, wilful, malicious and
11 unlawful use and exhibition of plaintiff's pictures or photographs, plaintiff has been greatly damaged, she has suffered great anxiety of mind, humiliation and mortification, been exposed to ridicule and contempt, and otherwise greatly injured.

Wherefore, plaintiff demands judgment:

(1) That the defendant, its agents and servants, be forever restrained and enjoined from using plaintiff's pictures or photographs or any of them for purposes of trade or advertisement.

(2) For the sum of $5,000 damages and for such other and further relief as to the Court may seem just and proper, together with the costs and disbursements of this action.

THOMAS E. O'BRIEN,
Attorney for Plaintiff, Office and P. O. Address 21 Cortlandt St., Borough of Manhattan, City of New York.

STATE OF NEW YORK,
County of New York, ss:

Aida T. Rhodes, being duly sworn, says that she is the plaintiff in the above-entitled action; that she has read the foregoing complaint and knows the contents thereof, and that the same is true of her own knowledge, except as to the matters stated therein to be alleged on information and belief and as to those matters she believes it to be true.

AIDA T. RHODES.

Sworn to before me this 19th day of June, 1905.
NELLIE M. FAILEY,
Notary Public, New York County.

12 *Answer.*

Supreme Court, Kings County.

AIDA T. RHODES, Plaintiff,
vs.
THE SPERRY AND HUTCHINSON COMPANY, Defendant.

The Sperry and Hutchinson Company, by John Hall Jones, its attorney, answering the complaint of the above named plaintiff,

First. On information and belief denies each and every allegation of said complaint, except the allegations contained in paragraphs marked "II" and "III," which allegations defendant admits.

Second.

For a second separate and distinct defense to the alleged cause of action set forth in said complaint, defendant alleges.

First. That as part of defendant's business it is engaged in the art, trade or profession of taking orders for photographs and portraits of persons who desire their photographs or portraits to be made, and that for the proper and lawful carrying on of said busi-
13 ness, which defendant alleges to be a lawful business, and for the proper and lawful information and knowledge of the

public, and to inform and acquaint the public and to enable the public and the customers of defendant to select intelligently such kind, style and finish of photograph and portrait as they desire, it is necessary that defendant shall display to the public and to its customers specimens of the various kinds, styles and finish of the photographs and portraits which it will undertake to furnish to them, for a proper and lawful consideration; and for such purposes and none other did defendant, it at all, display the photograph of plaintiff; and that in making such display defendant did not at any time call attention to the particular features or personality of plaintiff as shown by said photograph, but only displayed said photograph as an example of the skill and art, and as illustrating a particular style of workmanship which defendant was prepared to furnish to the public for a valuable consideration.

Second. That if defendant is prevented from displaying the result of its skill and art as contained in and illustrated by said photograph, the public will be deprived of proper, necessary, and the only practical means of knowing and selecting what it desires in style and finish of photographs; and defendant will be restrained in its liberty of pursuit, and its profits from the making of photographs will be cut off, and it will be compelled to desist from such work and will be deprived of the benefits of its skill, art, and enterprise.

Third. That Chapter 132 of the Laws of 1903, if construed to subject defendant to damages for using and displaying the
14 photograph of plaintiff in the manner and for the purposes set forth in this second defense, is unconstitutional and void as being in restraint of trade, commerce, and competition, and as depriving defendant, without due process of law, of the liberty to engage in a lawful business.

Third.

For a third separate and distinct defense to the alleged cause of action set forth in the complaint, defendant alleges, on information and belief,

First. That Sol. Young is engaged in the business of general photography, especially of making photographs and portraits of persons, at No. 17 Union Square, New York City, and at all times mentioned herein has been and is now so engaged. That the space occupied by said Young in said building is on the second floor thereof and is far removed from the street, and therefore the business of said Young in said building does not prominently attract the attention of the public.

Second. That in order to increase his business and bring it more prominently before the attention of the public, and to attract the attention of the public to the kind of work which he was able to perform as a photographer, said Young, in the month of October, 1904, made a contract with defendant, by which, for a valid consideration, defendant permitted said Young to place in its store at No. 152 West 23d Street, New York City, an assortment of photographs which said Young had made of persons dealing with him, for the

purpose of calling the attention of the very numerous persons
15 who frequented defendant's store, to the kind and quality of photography which said Young was engaged in furnishing.

Third. That said assortment of photographs were and are the property of said Young, and that defendant has no property therein, and that the same have been and are maintained under the sole ownership and supervision of said Young.

That among the photographs thus displayed in the wareroom of defendant by said Young, was the photograph of said plaintiff, which was displayed pursuant to said contract, for the purposes aforesaid, and that defendant did not at any time call attention to the photographs of plaintiff, or represent said photographs as types of those obtainable for a certain number of defendant's trading stamps as alleged in paragraph "IV" of the complaint herein.

Fourth. On information and belief defendant denies each and every one of the allegations contained in paragraphs "VI," "VII," "VIII," and "IX" of said complaint.

Fifth. On information and belief, that in the latter part of the month of February, 1905, one of the store attendants of defendant, Mrs. Leinbach, was accosted by a woman who called her attention to a photograph in said store, and asked her if she knew who the person was. Mrs. Leinbach replied that she did not know, whereupon said person said "It is a photograph of my sister-in-law. It is her wedding dress." No instructions were given by said person to defendant or its attendants, to remove the same.

About two weeks afterwards a man called and asked Mrs. Leinbach to remove said photograph from the case in which it was. He
16 was referred to the manager of defendant and had some conversation with said manager, and afterwards told said Mrs. Leinbach that the manager directed said photograph to be removed. Whereupon said Leinbach immediately removed said photograph from public view, and it has not since been exhibited in said store. Said person inquired whether there were any other photographs of the same person, and said Leinbach informed him there were two other photographs in Mr. Young's wall case, and explained that all these photographs belonged to and were placed by Mr. Young for exhibition in said store. Said person did not ask to have said photographs removed from said wall case, but defendant caused said photographs to be covered so that they were no longer exposed to public view.

Wherefore, defendant demands judgment against the plaintiff that the complaint herein be dismissed with costs.

JOHN HALL JONES,
Attorney for Defendant, Office and Post Office Address, 320 Broadway, New York, Borough of Manhattan.

STATE AND COUNTY OF NEW YORK, *ss:*

On the 6th day of July, 1905, before me personally appeared A. M. Hirst, who, being duly sworn, deposed and said that she resides in Brooklyn, New York City, that she is the secretary of The Sperry

and Hutchinson Company, the defendant named in the foregoing answer; that she has read the same and knows the contents thereof,
and that the same is true of her own knowledge except as to
17 the matters therein stated to be alleged on information and
belief, and as to those matters she believes it to be true. That the reason this verification is made by deponent and not by defendant is that defendant is a corporation, and deponent is an officer thereof, duly authorized to make this verification.

A. M. HIRST.

Sworn to before me this 6th day of July, 1905.

E. B. WRIGHT,

[SEAL.] *Notary Public, Kings County, New York.*

Certificate filed in New York County.
Commission expires March 30th, 1906.

Defendant's Proposed Decision.

Supreme Court, Kings County.

AIDA T. RHODES, Plaintiff,
v.
THE SPERRY AND HUTCHINSON COMPANY, Defendant.

Defendant's Proposed Findings of Fact and Conclusions of Law.

The defendant, by John Hall Jones, its attorney, states and submits to the Court the following proposed findings of fact and conclusions of law in the above entitled proceeding.

18 First. That the photographs of plaintiff, which are the subject of litigation herein were at all times and now are the property of Sol. Young, the photographer who made them.

Not found. J. T. M.

Second. That said Young, with defendant's permission, placed said photographs in defendant's store, for the purpose of acquainting the public with the kind and quality of work done by him.

Not found. J. T. M.

Third. That such display or exhibition of said photographs as was made in defendant's store was made by said Young, and not by this defendant.

Not found. J. T. M.

Defendant's Conclusions of Law.

Defendant states the following conclusions of law upon the evidence in the above entitled proceeding.

First. That defendant is not the proper party defendant in this proceeding.

Not found. J. T. M.

Second. That the photographs which are the subject of litigation herein were lawfully made by said Sol. Young, the photographer.

Not found. J. T. M.

Third. That said photographs were lawfully and properly exhibited by said Young for the purpose of carrying on a lawful business.

Not found. J. T. M.

19 Fourth. That Chapter 132 of the Laws of 1903 was not intended to apply to the facts disclosed by this proceeding, and if so intended, is unconstitutional and void.

Not found. J. T. M.

Dated, December 8th, 1905.

JOHN HALL JONES,
Attorney for Defendant, 320 Broadway, New York City.

Exceptions to Decisions.

Supreme Court, Kings County.

AIDA T. RHODES, Plaintiff,
v.
THE SPERRY AND HUTCHINSON COMPANY, Defendant.

The defendant, The Sperry and Hutchinson Company, hereby excepts to the decision of Mr. Justice Marean made at a Special Term for trials of this Court, and filed in the office of the Clerk of the County of Kings on the 14th day of December, 1905, in the following particulars:

First. To the finding of fact No. II upon the ground that
20 there is no evidence to support the same.

Second. To the finding of fact No. III upon the ground that there is no evidence to support the same.

Third. To the finding of fact No. V upon the ground that there is no evidence to support the same.

Fourth. To the conclusion of law No. I.

Fifth. And the defendant, The Sperry and Hutchinson Company further excepts to the refusal to find the first finding of fact submitted by the defendant.

Sixth. To the refusal to find the second finding of fact submitted by the defendant.

Seventh. To the refusal to find the third finding of fact submitted by the defendant.

Eighth. To the refusal to find the first conclusion of law submitted by the defendant.

Ninth. To the refusal to find the second conclusion of law submitted by the defendant.

Tenth. To the refusal to find the third conclusion of law submitted by the defendant.

Eleventh. To the refusal to find the fourth conclusion of law submitted by the defendant.

Dated, New York, December 15th, 1905.

JOHN HALL JONES,
Attorney for Defendant, 320 Broadway,
New York City, N. Y.

21 *Decision.*

Supreme Court, Kings County.

AIDA T. RHODES, Plaintiff,
against
THE SPERRY AND HUTCHINSON COMPANY, Defendant.

Decision.

The issues of law and fact raised by the answer of defendant, on which the plaintiff based her right to equitable relief, duly coming on to be tried by the court at a Special Term for Trials, held by the undersigned without a jury, and the allegations and proofs of the respective parties having been heard, and after hearing Mr. Thomas E. O'Brien, counsel for the plaintiff, and Mr. John Hall Jones, counsel for the defendant,

And due deliberation having been had, I decide and find as follows:

Findings of Fact.

I. That the defendant is a foreign corporation organized under the Laws of the State of New Jersey.

II. That the defendant is engaged in the business of issu-
22 ing and redeeming trading stamps and at the time this action was begun, and for some time prior thereto, the defendant occupied the premises Numbers 152 to 154 West Twenty-third Street, Borough of Manhattan, The City of New York, and used the same as an office for the exhibition of premiums obtainable upon the surrender of trading stamps issued by the defendant.

III. That the defendant at the time when this action was begun, and for some time prior thereto, was using, exhibiting and displaying in said office of the defendant, pictures or photographs of the plaintiff in different poses, as premium exhibits and for the purpose of advertising the benefits conferred on the holders of trading stamps issued by defendant and to acquire a larger trade and custom by such use, exhibition and display.

IV. That the plaintiff has never consented in writing or otherwise to the use, exhibition or display of her picture or photograph.

V. That the plaintiff has suffered damages by the defendant's use of her picture or photograph as above set forth.

Conclusions of Law.

I. The plaintiff is entitled to an interlocutory judgment permanently preventing and restraining the defendant, its agents, servants and representatives, from using plaintiff's pictures or photographs, or any of them, for purposes of trade or advertising and providing for an assessment of damages against the defendant by a jury at a Trial Term of this Court, and that on the return of the assessment

of damages by such jury, final judgment shall be entered
23 herein for the amount of the damages so ascertained, together with costs and an allowance of five per cent. to the plaintiff on the total amount of damages assessed, and I direct judgment accordingly.

J. T. MAREAN, *J. S. C.*

Interlocutory Judgment.

Supreme Court, Kings County.

AIDA T. RHODES, Plaintiff,
against
THE SPERRY AND HUTCHINSON COMPANY, Defendant.

Judgment.

The issues in this action on which the plaintiff based her claim to equitable relief, having been regularly brought on for trial before Mr. Justice Marean, at a Special Term for Trials for this Court, held on the 7th day of December, 1905, at the County Court House in the County of Kings, and the Court having heard the allegations and proofs of parties and the argument of counsel and after due deliberation, having fully made and filed on December 13, 1905, a decision in favor of the plaintiff, containing a statement of
24 the facts found and conclusions of law and directing an interlocutory judgment for the plaintiff permanently preventing and restraining the defendants, its agents, servants and representatives, from using plaintiff's pictures or photographs, or any of them, for purposes of trade or advertising, and providing that the damages to be awarded the plaintiff be assessed by a jury at a Trial Term of this Court and that on the return of the assessment of said damages by such jury, final judgment shall be entered herein for the amount of the damages so ascertained, together with the costs of this action and an allowance of five per cent. to the plaintiff on the total amount of damages assessed;

Now, on motion of Thomas E. O'Brien, attorney for the plaintiff herein, it is

Ordered, adjudged and decreed, That the defendant, its agents, servants and representatives, be forever enjoined, prevented and restrained from using the plaintiff's pictures or photographs, or any of them, for purposes of trade or advertising.

It is further ordered, adjudged and decreed, That, in accordance with Chapter 132 of the Laws of 1903, the damages herein be assessed by jury at Trial Term, Part I, of this Court, on the 18th day of December, 1905, or as soon thereafter as the Judge presiding at said Trial Term, Part I, shall determine.

It is further ordered, adjudged and decreed, That on the return of the finding and assessment of damages by such jury, final judgment shall be entered herein for the amount of the damages so ascertained, together with the costs of this action and an extra allow-

ance to the plaintiff of five per cent. on the total amount of damages assessed.

J. T. M.

Granted Dec. 13, 1905.
EDWARD KAUFMANN, *Clerk.*

25 *Extract from Minutes.*

At a Trial Term of the Supreme Court of the State of New York, Held in and for Kings County, at the Court House, in the Borough of Brooklyn, on the 27th day of November, 1906.

Present—Hon. James A. Betts, Justice.

Part IV.

AIDA T. RHODES
vs.
THE SPERRY & HUTCHINSON COMPANY.

This cause having been called for trial in its order on the Calendar, and twelve trial jurors were duly drawn, empanelled and sworn to try the same. The jury come into court and say that they find a verdict for the plaintiff for One Thousand ($1,000) dollars.

Defendant moved for a new trial. Motion denied.

The Court, on motion granted the defendant a stay of execution for 30 days after notice of entry of judgment, and 30 days to make a case.

A true extract of minutes.

CHARLES T. HARTZHEIM, *Clerk.*

26 *Final Judgment.*

Supreme Court, Kings County.

AIDA T. RHODES, Plaintiff,
vs.
THE SPERRY & HUTCINSON COMPANY, Defendant.

The issues in this action having been regularly brought on for trial before Mr. Justice Josiah T. Marean, at a Special Term for Trials of this Court, held on the 7th day of December, 1905, at the County Court House in the County of Kings, and the Court having heard the allegations and proof of the parties and the argument of counsel and after due deliberation, having duly made and filed on December 13, 1905, a decision in favor of the plaintiff, containing a statement of the facts found and conclusions of law and directing an interlocutory judgment for the plaintiff, permanently preventing and restraining the defendant, its agents, servants and representatives from using plaintiff's pictures or photographs or any of them,

for purposes of trade or advertising, and providing that the damages to be awarded the plaintiff, be assessed by a jury at a Trial Term of this Court, and that on the return of the assessment of said damages, by such jury, final judgment shall be entered herein
27 for the amount of the damages, so ascertained, together with the costs of this action, and an allowance of five (5) per cent to the plaintiff on the total amount of damages assessed.

An Interlocutory Judgment having been entered thereon, on December 14, 1905, and the assessment of damages, pursuant to said interlocutory judgment, having been regularly brought on for trial before Mr. Justice James A. Betts, and a jury at a Trial Term, Part IV. of this Court, held on the 27th and 28th days of November, 1906, at the County Court House in this County and the defendant appearing by counsel, and the issues on said assessment of damages having been tried and the jury having rendered a verdict for the plaintiff, for the sum of One Thousand Dollars ($1,000), and the costs of the plaintiff having been duly adjusted at Two Hundred Thirty and 61/100 Dollars ($230 61/100) including an allowance which the Court at Special Term granted, of five (5) per cent on said verdict.

Now on motion of Thomas E. O'Brien, attorney for the plaintiff herein, it is ordered, adjudged and decreed that the defendant, its agents, servants, and representatives be forever enjoined, prevented and restrained from using the plaintiff's pictures, or photographs or any of them for purposes of trade or advertising.

It is further ordered, adjudged and decreed that the plaintiff recover of the defendant the sum of One Thousand Dollars ($1,000.00) with Two Hundred Thirty and 61/100 Dollars ($230 61/100) costs, amounting in all to the sum of One Thousand Two hundred Thirty and 61/100 Dollars ($1,230 61/100).

Judgment signed and entered this 30th day of November, 1906.

CHAS. T. HARTZHEIM, *Clerk.*

28 *Case Containing Exceptions on the Trial to Determine Plaintiff's Right to an Injunction Only.*

Supreme Court, Kings County.

AIDA T. RHODES, Plaintiff,

v.

THE SPERRY AND HUTCHINSON COMPANY, Defendant.

This action came on trial before Mr. Justice Marean at a Special Term for trials in the Supreme Court, Kings County, on the 7th day of December, 1905.

The following is all the evidence taken and proceedings had upon the trial of this action:

Appearances:

Thomas E. O'Brien, for Plaintiff.
John Hall Jones, for Defendant.

Mr. O'Brien stated the cause of action and moved for a jury trial of all the issues.

The COURT: I shall try the main question and send the case to Part I to ascertain the damages.

29 AIDA T. RHODES:

Direct examination.

By Mr. O'BRIEN:

I last sat for my photograph on June 11th, 1904, at Young's, Fulton Street. I ordered six and paid for them. I sat in three poses and accepted one.

Mr. O'BRIEN: I call for the production of the small photograph which was exhibited by the defendant.

By Mr. O'BRIEN:

This picture which is shown me is my picture, the photograph. I have seen that picture or photograph within the last year elsewhere than in my own home or in the homes of those to whom I gave copies.

Q. Where?

A. In Sperry & Hutchinson's, in Twenty-third Street between Sixth and Seventh Avenues, New York. That is a photograph of myself, for which I sat at Young's in Fulton Street.

Photograph marked in evidence, Exhibit 1.

I saw it and another one enlarged, that I did not order, in the Twenty-third Street branch of Sperry & Hutchinson. One of those photographs which he took and which I did not accept..

Mr. O'BRIEN: I call for the production of the enlarged photograph.

Mr. JONES: I don't know of any such; the only one I have is this, which may be termed an enlargement.

By Mr. O'BRIEN:

I have seen such an enlargement at the store of the defend-
30 ant. The picture represents me in my wedding dress and hat, holding a fan in my hand. It was on the wall, the enlargement was on the wall in the cabinet, and another smaller one alongside of it, and two on the counter in the case. I never consented in writing or otherwise that my photograph should be used by any concern or individual for the purpose of trade or advertising, or any purpose.

By the COURT:

They did not get any of these from me.

By Mr. O'BRIEN:

The knowledge of the display of that photograph annoyed me very much

Q. What was the nature of the annoyance?

Objected to.

The COURT: I do not need that; there is a right of privacy which no one has the right to violate.

Cross-examination.

By Mr. JONES:

I think the latter part of February I was in Sperry & Hutchinson's store and saw this photograph. I did not speak to any one in the store at that time. I have been in the store twice only. I did not speak to any one on any other occasion. I never said anything either orally or in writing to The Sperry & Hutchinson Company in regard to the exhibition of my photograph, but my husband did.

By Mr. O'BRIEN:

Q. Did you give anyone instructions to speak with regard to that photograph?

The COURT: That is not necessary.

31 WILLIAM B. CLARKE, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. O'BRIEN:

I am the manager of The Sperry & Hutchinson Co. in New York, and I am familiar with the character of the premises, 152-154 West 23rd Street. The ground floor is used for a display room for premiums, display and delivery.

By the COURT:

Q. You know the photograph was of the plaintiff.

A. I did not know it; no, sir.

Those photographs were delivered to me by Mr. Sol Young, a photographer, to show and display the class of work he does. He is the photographer who took this.

By Mr. O'BRIEN:

Q. Do you not deliver orders for photographs in exchange for trading stamps issued by your company?

Objected to; objection overruled; exception.

A. I deliver a voucher for one book of trading stamps or more for the several sizes that Mr. Young has entered into a contract to make for me, at a stipulated price; they merely show the work he does. For a certain number of trading stamps I give a coupon that entitles the holder to go to Sol. Young and get a photograph. Mr. Young brings these photographs and puts them in our show case; he brought them and hung them by his employees in our rooms.

32 They are there for the purpose of showing people the kind of work Mr. Young does.

Cross-examination.

By Mr. JONES:

Mr. Sol. Young owns the photographs offered in evidence. He brought them there and laid them on the show case for the young lady to put them in the show case; he wanted to supply a show case for nothing but photographs, but I hadn't the room to give him a separate show case, and he offered to put in his own sales lady to wait on the public if I would allow him. As I had a contract with Dana, at 28th street and Broadway, in justice to both parties I could not afford to let Mr. Young put in his own people; they might talk against Mr. Dana's work. Mr. Sol. Young owns the large picture on the wall.

By the COURT:

Sol. Young owns all the photographs, and none of them are ours at all. He made a contractual arrangement with The Sperry & Hutchinson Co. by which he was permitted to display photographs in my store, and other branches.

Plaintiff rests.

Mr. JONES: I move for a dismissal of the complaint upon the ground that the plaintiff has no right of privacy under the decision of Roberson v. The Rochester Folding Box Company; and further that the plaintiff has sued the wrong party, the defendant being shown not to own the photograph.

Motion denied; defendant excepts.

33 The following evidence was offered by the defendant:

WILLIAM B. CLARKE, recalled by the defendant, testified as follows:

Direct examination by Mr. JONES:

As manager of the Twenty-third street store I have not at any time called the attention of any person to the photograph of the plaintiff. I recognize this photograph. I never called the attention of any one to that particular photograph or to any other photograph in my store; no particular photograph. There is a lot of them there, standing on easels most of them.

Cross-examination by Mr. O'BRIEN:

I don't know how the photograph was taken. I did not look at any of them.

SOL. YOUNG, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination by Mr. JONES:

I recognize this photograph as having been made by me or in my presence.

By Mr. JONES:

Q. Will you explain how that photograph came to be in the possession of The Sperry & Hutchinson Company?

The COURT: We have it already. The manager has testified to that.

34 Q. Why was this photograph delivered to The Sperry & Hutchinson Co. by you?

Objected to as calling for a conclusion. Objection sustained; defendant excepts.

This photograph belongs to me. I am a photographer, and have been in business fifteen years, and I have at all times during those years exhibited photographs of persons in order to show the character of my work, the artistic quality.

By the COURT:

Q. You exhibit them in your own place?
A. Yes, sir.
Q. Not in the trading stamp place?
A. At some fairs I have.

By Mr. JONES:

Q. Have you exhibited that photograph in the store of The Sperry & Hutchinson Company?

The COURT: I will exclude that.
Defendant excepts.

Q. State to the Court just how your particular business is located on the floor of your store?

The COURT: I will exclude that.
Defendant excepts.
Mr. JONES: I will conclude my case and move that the cause of action be dismissed.
The COURT: Motion denied.
The COURT: Judgment for the plaintiff for an injunction and interlocutory judgment directing that damages be assessed
35 at Part I by a jury, and providing that upon the assessment of the damages judgment be further entered for an injunction and for the damages so ascertained.
Mr. O'BRIEN: I ask for costs.
The COURT: I will give you costs and an allowance of 5% on whatever amount the damages may be assessed at.

Case Containing Exceptions.

(Testimony given upon the trial of the issue of damages.)

Supreme Court, Kings County.

AIDA T. RHODES
v.
THE SPERRY AND HUTCHINSON COMPANY.

Before Hon. James A. Betts, J., and Jury.

BROOKLYN, NEW YORK, *November* 27, 1906.

Appearances:
Thomas E. O'Brien, Esq., for plaintiff.
John Hall Jones, Esq., for defendant.

A jury having been impanelled and sworn, Mr. O'Brien opens case for plaintiff:

36 Mrs. AIDA T. RHODES, called as a witness on behalf *or* herself, being first duly sworn, testified as follows:

Direct examination by Mr. O'BRIEN:

I live at 455 Jefferson avenue, and am twenty-three years old. I was married on November 24, 1903, and first sat for my photograph in June, 1904.

Q. What was the occasion of that sitting?
A. To give my husband one of my pictures.

DEFENDANT'S COUNSEL: Objected to.
The COURT: Objection sustained. Plaintiff excepts.

I was attired at the time of sitting for my photograph in my wedding gown and hat. That picture was taken in Young's photograph studio on Fulton street, Brooklyn. I ordered six and paid for them with my own money, not with trading stamps, coupons or anything of that kind. I paid $6.00 for them. I ordered one pose.

Q. Half a dozen pictures in one pose?
A. In one pose.

DEFENDANT'S COUNSEL: I object. This line of testimony is not material to the issue. The allegation is that the plaintiff's photograph was exposed in the defendant's store.

Objection overruled; exception.

In ordering these six pictures, before the finished print was made, several proofs were sent to me. Those proofs were sent to a friend of mine. I did not want my husband to see them. I wanted
37 to surprise him. I can't tell just what size of picture I ordered. That is about the size of the picture I ordered (indicating picture). I ordered six of those and that is the pose.

Photograph put in evidence and marked Exhibit A.

I did not order any other poses. I received a proof of another pose taken at the same sitting. I saw a picture taken in another pose at that sitting in Sperry & Hutchinson's trading stamp store on 23rd Street. I had six pictures taken in one pose.

Q. What disposition did you make of those photographs you ordered?

A. I gave three to my family and three to my most intimate friends.

DEFENDANT'S COUNSEL: I object to the answer and move to strike it out as irrelevant and incompetent, the only question here being what damages were suffered.

The COURT: I think that is so. I will allow this to stand. Confine yourself to the question sent here as to damages.

I first saw the photographs in other places than the homes of those to whom I sent them on June 19th, 1905. I swore to this complaint on June 19th, 1905, and saw them at that time and had seen them previously. I can't tell when I saw them for the first time. I made a visit to The Sperry & Hutchinson Company, the trading stamp premium room, in the first part of February, 1905, I think.

By the COURT:

That is when I first saw them.

38 By Mr. O'BRIEN:

On the occasion of that visit I saw on exhibition there two photographs of myself; two in the case on the wall and two in the counter. There was an enlargement in the case on the counter that I did not order, and one on the right-hand corner of the case.

By the COURT:

I mean the other pose different from the pose I ordered.

By Mr. O'BRIEN:

I saw one enlargement and one in the right-hand corner of the case and two on the slab, glass slab in the counter. I saw these in Sperry & Hutchinson's trading stamp store, on 23rd Street, New York. Going in from the entrance,—the case is on the wall in the left-hand side, opposite the counter.

The case was almost the full size of the wall, I think. I think it was larger than three feet by six. There were several other photographs in that case beside mine; all smaller. The large photograph I saw was in the very centre on the top. I saw a picture like that (indicating). It looked larger to me. It was not a mere piece of photograph paper. It was on a large cardboard mounted, about three feet, I guess, it was very large, about as large as that (illustrating).

Photograph offered and received in evidence. Marked Exhibit B.

That photograph represents me in a pose other than I ordered.

After seeing that picture I went to see my lawyer and I
39 told him about it and he sent my husband to look after it.
I next saw the pictures at the premium room on June 19th, 1905, the day I swore to the complaint. I never consented in writing or otherwise to the exhibition of my photograph by The Sperry & Hutchinson Co. or to its exhibition by any company, concern or individual.

Q. Now just describe what effect the knowledge of the exhibition of that photograph had upon you. Tell the jury how you felt about it.

A. It humiliated me very much. It made me very nervous and upset me in general.

DEFENDANT'S COUNSEL: Objected to as incompetent, immaterial and irrelevant.

Objection overruled; exception.

I never ordered any large picture. That is a book that you put trading stamps in issued by The Sperry & Hutchinson Company (handing witness book). It is obtained from some minor concern issuing Sperry & Hutchinson trading stamps. I procured that book on Bedford Avenue near South Fourth Street, Brooklyn, in the trading stamp store there.

Book offered and received in evidence marked Exhibit C.

I did not ask them to take it down.

Cross-examination by Mr. JONES:

Seven months after my marriage I sat for this photograph and at that time I saw other photographs in Mr. Young's Brooklyn store.

Q. Were those photographs shown to you so that you might select a pose?

40 Objected to as incompetent, irrelevant and immaterial, and not within the issue.

Objection overruled; exception.

I saw other photographs at that time to see the particular background. That is all. There were other photographs of persons shown me in that store and I did not object then to looking at them.

Q. You knew at that time it was the custom of photographers to show photographs?

Objected to as incompetent and irrelevant.

Objection sustained; exception.

The store of The Sperry & Hutchinson Co. is on 23rd Street and is large enough to have two entrances, and I believe, I am not sure, whether it has two or three windows. It is half the size of this room, I guess. The counter that I saw my photograph in is on the right-hand side going in at the last entrance. The wall case was on the left as I entered. The counter is across the room from the wall case. I did not examine the wall case. I did not look at it very carefully. I didn't see anything advertised in it. I

did not notice any advertising matter. I saw my two photographs in it. I saw that (indicating Exhibit B). That is the identical photograph. I did not see any others like that. I do not consider this photograph a good likeness. I am not in business and never have been. I have been married and I have not earned any money. I have not lost any money by reason of the exhibition of this photograph which I saw in defendant's store. I have a large circle of friends and I remember testifying at the trial of the injunction suit. I did not testify there that I did not know anyone who
41 saw that photograph except myself. Someone saw that particular photograph besides myself. Friends of mine saw it. My sister-in-law, Mrs. Rhodes, and her daughter saw it. My sister-in-law told more than one person she had seen it up there. She told me and other people, too. What my sister-in-law told me is the first information I had in regard to it. Then I went to the store and saw it myself. My sister-in-law and I are good friends.

Q. She did not despise you, did she, because of the exhibition of this photograph?

Objected to; objection sustained.

Q. Did your sister-in-law ever say anything to you which would lead you to believe that she thought less of your character or reputation than she thought before because she had seen this photograph in the store of the defendant; had she ever said anything to that effect?

Objected to as incompetent; objection overruled; exception.

A. No.

I have been in the habit of receiving invitations to parties and dances and balls since I have been married.

Q. Has anyone ever declined to give you an invitation to parties because of the exhibition of this photograph?

Objected to as immaterial; objection overruled; exception.

A. No, sir.

I have a good memory. I remember what was testified at the previous trial of this case. I have not suffered any loss of mem-
42 ory since that time, or since my marriage. My reputation I think is as good among my friends as it was at the time I was married. I have testified and I remember that I am testifying on oath and the facts may be presented to affect my testimony—I have testified that all the photographs in that large case were smaller that that (indicating Exhibit B), and I think they were smaller than that. I never spoke to a representative of defendant in regard to this photograph. When I went into the store of The Sperry & Hutchinson Co. and saw this photograph of mine in that case, I did not speak to any person in that store in regard to it. I made no objection whatever at that time. I did not ask any person to remove that photograph from that store at that time.

This is a copy of the half dozen photographs which I say I distributed (indicating Exhibit A). It is a good likeness. I do not

think that I have been injured physically by the exhibition of this photograph but it has humiliated me and made me very nervous and very much upset when I heard of it and saw it.

Q. On this one occasion?

A. Yes.

Redirect examination by Mr. O'BRIEN:

And every time I thought of it. I went there to look for the picture. I did not examine the wall case. I was not examining because I was looking to see whether my picture that I had been told was there was actually there. That is all I went for. My sister-in-law kind of laughed satirically, and she said, "I saw your picture in Sperry's trading stamp store; that is very funny," she said. When my sister-in-law spoke about the picture she said it was very queer
my picture should be up in Sperry's trading stamp store.
43 Did you tell them they could have it up there. I said no, I
didn't know about it. That was the first I ever heard of it, and I think it is very peculiar, she said, they had it in the window, and I went inside and asked, I just wanted to find out why they had it there, and I asked.

DEFENDANT'S COUNSEL: I move to strike that out.

The COURT: The latter part.

My reputation is as good as the day I was married, every bit of it. No taint upon me whatever. My social obligations are as many in number, and as great a circle of friends, and that circle is very large.

FRANK C. RHODES, called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. O'BRIEN:

I am the plaintiff's husband, and am an accountant, employed with the Bank of America in New York City, and have been employed there for eighteen years. My income ranges from $3,000 to $4,500 a year. It is not solely the salary from the bank. I have seen the photograph of my wife on exhibition at the Sperry Trading Stamp store in the first part of February, 1905; my lawyer dictated to me that I should go up there and ask them for the removal of those photographs which were on exhibition at the store. I, in company with another gentleman, associated with me in business, went up town ostensibly to have these photographs removed. I went into
the store without speaking to anybody at first, observed this
44 cabinet on the wall containing these two photographs as already stated. The larger of the photographs in the middle of the top was one which I had never seen before, and on the right-hand corner was a smaller photograph displayed, one similar, that had been ordered by my wife and presented to me on my birthday. I went to the counter to see the woman there in the employ of the Company, and I looked through the case and observed two photographs there. I asked her to be permitted to look at them. She took

one of the photographs out, and I said, this is the picture of my wife, I would like to have it removed. She said, "If you go up to see Mr. Clarke," I think she said, "on the third floor, you can speak to him about it." I went up to the third floor and saw Mr. Clarke and told him my mission and said there have been four pictures to my knowledge being displayed in the trading stamp store and I would like to have them removed. In anwer he said, I well telephone Mr. Young immediately and have pictures sent for to replace them; and I thanked him and departed. Mr. Cohessey was with me. I went there at the request of my wife. My wife had mentioned it a number of times.

Q. Did your wife ever protest to you against the use of her photograph?

Objected to as incompetent, irrelevant and immaterial.

Objection overruled; exception.

A. She did, most positively.

I can't say that I ever noticed any particular effect upon my wife owing to the display of this photograph. I know that it made her, unnerved her greatly, and upset her in many many instances. She frequently spoke to me of it. I said to the clerk in the store,
45 I would like to look at those photographs in the case and she took one of them out and showed it to me and I told her it was my wife's photograph and I would like to have it removed; just used those words; and she referred me to Mr. Clarke, the manager. I told the manager in substance that pictures of my wife were being displayed in the store and that I would like to have them removed, and he in turn told me that he would telephone—those are the identical words—he would telephone Mr. Young immediately. By the identical words, I mean that is my recollection. I didn't take them down, but I remember quite vividly what he said.

JOHN H. COHESSEY, called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

Direct examination, by Mr. O'BRIEN:

I heard Mr. Rhodes testify. On one occasion I accompanied Mr. Rhodes to The Sperry & Hutchinson premium room on West 23rd Street. Mr. Rhodes and I were looking in the store and saw the photograph referred to and Mr. Rhodes went in to the counter and the clerk exhibited one of the pictures of his wife, a cabinet. He asked the young lady to let him see the picture and she did. He said he would like to have the picture removed and she said he would have to see Mr. Clarke. I accompanied Mr. Rhodes to the second or third floor and he saw Mr. Clarke, presumably. Mr. Clarke said he was very sorry he caused Mr. Rhodes any annoyance, but he would communicate immediately with Mr. Young, who, I believe, was the photographer, and had the pictures replaced by others. That
46 was all that happened in my presence. Everything was very courteous. No dispute whatever; very friendly. It was in the early spring of 1905.

Cross-examination, by Mr. JONES:

I went in the store on Saturday. I accompanied Mr. Rhodes upstairs and downstairs. I have no recollection that he stopped at the counter when he came down. I saw the wall case in which the plaintiff's photograph was exhibited. I saw this sign or something similar on the wall at that time (indicating Defendant's Exhibit No. 1). I could not say where it was. I saw in the large case something similar to that advertisement, the name of Young, etc. I heard Mr. Rhodes testify that Mr. Clarke told him he would communicate with Mr. Young immediately, and have him replace the pictures, as far as I can recall. I then left the store.

DEFENDANT'S COUNSEL: I offer in evidence this cardboard sign.
PLAINTIFF'S COUNSEL: I object to it as irrelevant, incompetent and improper and not within the issues before this jury.

Received and marked in evidence Defendant's Exhibit No. 1.

AIDA T. RHODES, recalled, testified as follows:

Re-re-direct examination by Mr. O'BRIEN:

On the occasion of my last visit to the Sperry & Hutchinson Trading Stamp Co. the pictures were still in the case, and that was the day I swore to the complaint.

47 Recross-examination by Mr. JONES:

The time I stated that I had examined the wall case in which my photograph was contained. I do not recall any sign; I don't remember that sign in the case at all. (Referring to Defendant's Exhibit No. 1.)

Q. At the time you sat for your photograph at Mr. Young's, did you instruct Mr. Young or any employee of Mr. Young not to exhibit your photograph in any place?

Objected to as incompetent, irrelevant and immaterial.
Objection sustained; exception.

By the COURT:

The studio of Mr. Young is in Brooklyn on Fulton Street near Flatbush Avenue and this trading stamp establishment is in New York on 23rd Street.

ELSIE M. LEMBACH, called as witness on behalf of plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. O'BRIEN:

I am and have been for the last two or three years a clerk in the premium room of the Sperry & Hutchinson Co., on West 23rd St., New York. We merely take orders for photographs exhibited there. I stood behind the silver counter, the case where the photographs are exhibited. I have been with the Sperry & Hutchinson Co. for

two years and a half. That premium room is quite a busy
48 place. We have a great many people who come in to see what we have. Perhaps seven or eight hundred would come in daily.

Plaintiff rests.

DEFENDANT'S COUNSEL: I move to dismiss the action for damages on the ground that the plaintiff has shown absolutely no damages.

Motion denied. Exception.

SOL. YOUNG, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. JONES:

I am a photographer at 17 Union Square, New York, and at 597 and 599 Fulton Street, Brooklyn. I recognize this photograph, Exhibit A, as having been taken in my Brooklyn branch.

Q. Is the Brooklyn end of your business or the New York end of your business the principal place?

Objected to as incompetent, irrelevant and immaterial.

Objection overruled; exception.

A. New York.

I recognize this photograph, Exhibit B, as having been taken in my place of business.

Q. Did you make a contract with the Sperry & Hutchinson
49 Co. by which you were to be allowed to display your photographs in its 23rd Street store?

Objected to as incompetent, irrelevant and immaterial, and not within the issues before the jury.

Objection sustained; exception.

Q. Did you cause a frame or case containing photographs made by you to be placed in the store of the Sperry & Hutchinson Co.?

Same objection, ruling and exception.

A. Yes, sir.

That frame was about 20 inches by 40 inches. That frame at that time contained this advertisement (indicating Defendant's Exhibit No. 1), in the centre of the frame.

Q. Did you cause this photograph (Plaintiff's Exhibit B) to be placed in that frame?

Objected to as incompetent, irrelevant and immaterial and not within the issues.

Objection overruled; exception.

A. Yes, sir.

I have been in the photographic business fifteen years.

Q. Have you during that time exhibited photographs in places other than the studio wherein the sitter sat for them?

Objected to as immaterial, irrelevant and incompetent.

Objection sustained; exception.

50 Q. Is it the general custom of photographers to exhibit photographs in places other than their own studio?

Objected to as incompetent, irrelevant and immaterial.
Objection sustained.

Q. Can you give an instance of a photographer other than ourself exhibiting photographs in places other than his own studio?

Same objection.
Objection sustained; exception.

Q. Mr. Young, did you own all the photographs that were in that case?

Objected to as calling for a conclusion.
Objection sustained.

Q. Is this photograph your property? (Indicating plaintiff's Exhibit A.)

Objected to as calling for a conclusion, as incompetent, irrelevant, and immaterial, and not within the issues.
Same objection, ruling and exception.

Cross-examination by Mr. O'Brien:

This sign was put up in the Sperry & Hutchinson Trading Stamp Co. (indicating defendant's Exhibit No. 1) about two years ago at the same time this photograph was put up (indicating plaintiff's Exhibit B) and was about in the centre of the case.

51 I can't tell where the plaintiff's photograph was with respect to the position of that sign, and I don't know, I couldn't tell exactly, I don't remember the grouping of the photographs around the sign.

Redirect examination by Mr. Jones:

Q. Did you supply photographs to the defendant aside from the photographs which were in this frame?
Objected to as irrelevant.
Objection sustained.

Elsie Lembach, recalled as a witness on behalf of defendant, testified as follows:

Direct examination by Mr. Jones:

I recognize this gentleman, Mr. Rhodes (indicating). I remember the occasion of his coming into The Sperry & Hutchinson Trading Stamp Store. I was behind the counter at that time. I found a gentleman looking in the show case, and he asked to see a certain picture and said it was a picture of his wife. He said this picture was the picture of his wife, and then he asked if we had any others, and I told him there was one in the wall case. He said he wished them removed at once. I told him they were not the property of Sperry & Hutchinson but of Sol. Young, a photographer, but if he wished to speak to Mr. Clarke, he could step to the third floor, which

he did. I told him he could talk to him if he wished, which he did. I saw Mr. Rhodes again a few minutes later. He said he talked with Mr. Clarke and that Mr. Clarke would 'phone Sol. Young to
52 remove it at once, and Mr. Clarke said I should remove it from the show case, which I did. This looks like the photograph which was in the show case (indicating plaintiff's Exhibit A). I thereupon immediately removed that photograph from the show case. No photograph of the plaintiff was ever exposed in that show case thereafter. Exhibit B looks like the photograph that was in the wall case in the 23rd Street store. There was a photograph in the wall case at the time Mr. Rhodes called, and also this sign (indicating defendant's Exhibit No. 1), was in the centre of the wall case at the time Mr. Rhodes called. The case I should think was about 8 ft. by 10 ft. and contained about forty photographs. There are many photographs in that case as large as that (indicating plaintiff's Exhibit B), and there were also at the time Mr. Rhodes called, and before that time, and after. There are photographs larger than that in the case; I don't know that I could tell the number but there must have been in the neighborhood of a dozen in the case at that time. That frame was about eight ft. by ten ft. Mr. Rhodes called on Saturday afternoon, and on Monday morning Sol. Young came over to the store and asked which were the photographs to be removed from the wall case. I told him that I had taken those out from the show case and pointed to the one in the wall case that he was to remove. He said he would immediately send his man over to pick that one out and put others in their place. He did not send a man over. On Tuesday morning, as Mr. Clarke came in, he asked if Mr. Young had removed the one from the wall case. I told him he had not. He then said tell Arthur, the boy, to do something with it until Mr. Young could remove it, so I told Mr. Langley that he should tell Arthur, the boy, what Mr.
53 Clarke had said, and he asked me for a picture and a pin, which I gave him, and Mr. Langley then pinned another picture over this one in the wall case. That was done Tuesday morning, before business, of the week following the visit of Mr. Rhodes.

Q. I ask you to look at that photograph against the light and see if you note therein a hole?

A. I do.

That hole I should think might be made by the pin which I furnished to Mr. Langley. It is about the size. I do not remember ever having seen Mrs. Rhodes. My attention was first attracted to the photograph of Mrs. Rhodes by a young lady who asked to see the picture.

DEFENDANT'S COUNSEL: I would ask the Plaintiff's Counsel if the sister-in-law of Mrs. Rhodes is in court?

PLAINTIFF'S COUNSEL: No, the sister-in-law of Mrs. Rhodes is not in court.

A young lady attracted my attention to it and asked if she could see the picture, and I showed it to her. She said it was a picture

of her sister-in-law, and that the picture was taken in her wedding gown, and that the picture was better looking than she was, but that her gown was very beautiful. This is the photograph I showed her at that time (exhibiting plaintiff's Exhibit A). It was in the show case. She did not object at that time to the exhibition of her sister-in-law's photograph. That was all the conversation that occurred. The Sperry & Hutchinson Company's store is a double store, I should think about thirty feet wide.

Q. Is there on exhibition in that store a lot of photographs of any other photographer beside Mr. Young?

54 Objected to as incompetent, irrelevant and immaterial and not within the issue.

Objection overruled; exception.

A. Yes, sir.

Dana's photographs are on exhibition there.

Cross-examination by Mr. O'BRIEN:

I think the wall case was 8 ft. by 10. I heard Mr. Young testify that it was 3 ft. by 6, but I should judge it was 8 by 10. The wall case was a frame containing about forty pictures, with a large sign in the centre. It contained as many as forty pictures in February, 1905. I never saw the plaintiff, Mrs. Rhodes.

Redirect examination by Mr. JONES:

There was a lady in the store behind this counter at the time Mr. Rhodes called. This counter is on one side of the store and the wall case is on the other. That is the only wall case that has ever contained the photograph of the plaintiff, and it has never been changed since it was put up in there. It was there in February and it is there to-day, and there are to-day about forty pictures in it. I did not see this sign taken out of it the other day. (Indicating defendant's exhibit No. 1.) I know that it came out, though. I have seen that sign in the case, and it has never been removed out of that case from the first day of January up till five days ago.

Recross-examination by Mr. O'BRIEN:

The woman who represented herself as Mrs. Rhodes' sister-in-law spoke to me first some time in February, 1905. I did not speak to the manager as I had no reason to. Mrs. Rhodes' sister-
55 in-law asked to see the picture in the case and said it was the picture of her sister-in-law which was taken in her wedding gown, and that she was not as good looking as that picture, but that her gown was very beautiful. I did not report that fact to the manager or to anyone afterwards. I first told that fact to my attorney when he asked me over a year ago, about the time the injunction suit was tried. It was some time when the days were warm. I don't know that I can tell you the exact month.

MARY A. WEEKS, called as a witness on behalf of defendant, being duly sworn testified as follows:

Direct examination:

I am employed by The Sperry & Hutchinson Co., behind the counter where the photographs were, next to Miss Lembach. I remember having seen in the show case this photograph, Exhibit A (indicating). Mrs. Lembach showed it to me, and she said that a gentleman had just been in and requested the picture be removed from the case and she said she would take it out and put it in the drawer, and that we should be very careful never to display it. I saw her take it out of the case. I never saw it in the case or in the store again. I saw this photograph in the wall case (indicating Plaintiff's Exhibit B). My attention was not attracted to that photograph until after they had requested it be taken down, and then they were talking about covering the picture in the morning.

56 I did not see the picture covered, I don't remember of seeing it covered. I saw a cover on this picture (indicating plaintiff's Exhibit B). I think thereafter I saw that picture in the wall case uncovered. We found the picture on the floor and we looked to see where it came from and we discovered that it was the picture covering it. I saw the picture that covered it on the floor. I thought it came off that other picture. I don't know that I can give you the date that the picture was covered. I did not see anyone covering it.

Q. How near was it to the time when you saw Miss Lembach moving this picture out of the case and putting it into the drawer?

A. Just a few days, she took that one out on Saturday night. The next time my attention was called to the other picture, I saw that it was covered. I saw Mr. Sol Young in the store on the Monday following that Saturday night.

Cross-examined by Mr. O'BRIEN:

I don't know that I can tell you how large a cardboard this picture was mounted on. I should say that it would not be a cardboard as large as the white side of that (indicating Defendant's Exhibit 1); it wasn't as large as that. I should say it was about 9 inches by 12. I should say that the dimensions of this picture were about six by three (indicating Exhibit B). There would be about three inches of brown cardboard space on either side of this picture. I have been with The Sperry & Hutchinson Co. for three years, and from January, 1905, until June, 1905, I should say about seven or eight hundred people passed in and out The Sperry & Hutchinson premium room in West 23rd Street daily.

57 Redirect examination by Mr. JONES:

I saw this sign in the center of the wall case and it had always been there until it was removed. I did not see it removed.

WILLIAM T. LANGLEY, called as a witness on behalf of defendant, being duly sworn, testifies as follows:

Direct examination by Mr. JONES:

I am at the present time manager of The Sperry & Hutchinson Company's store. In February, 1905, I was assistant manager. My attention was attracted to that photograph, Exhibit B, or one similar, or one the same before. I was told an objection had been made to the exhibiting of this picture in the wall case, and it was to be removed or covered, and Mr. Young's man was coming to remove it and had not done so, so I asked for another picture of the same size from Mrs. Lembach who had charge of the photographs, and I pinned it over this picture, hiding it entirely from view. I see the mark of the pin on the top of that photograph. The pin passed through the photograph so as to go into this photograph and leave that mark (indicating plaintiff's Exhibit B). That photograph which was in the wall case was never exhibited thereafter to my knowledge. My attention was never attracted to it again. I noticed at different times that the photograph which I had pinned over remained on it; it was still covered. The case that this photograph was in is about 5½ feet by 8. I have measured it. I measured it with a stick that I have for hanging pictures in the store. It has a measure on it. It is 5½ by 8. That is the outside frame, outside cover. In February, 1905, this sign was
58 in that case (indicating Defendant's Exhibit No. 1), and it has been there continuously ever since the frame was put up. I removed it from the frame a few mornings ago.

Q. Is there an exhibit of photographs in that store of another photographer?

Objected to as incompetent and immaterial. Objection overruled; exception.

A. Yes, sir; by Mr. Dana.

The photographs which were in the frame containing the advertisement (indicating Defendant's Exhibit No. 1), which I showed you, were supplied by Mr. Sol. Young.

Q. Who hung them in the store?

Objected to as incompetent, irrelevant and immaterial.

Objection overruled; exception.

A. Mr. Young's man.

I could not swear positively that I had seen the photograph (Plaintiff's Exhibit A) before. My attention was confined to this one on the wall, when I was directed to cover it. I never attracted the attention of any person in my store to this photograph. I never heard any one in the store refer to this photograph, except in reference to my covering it. No member of the general public ever referred to it.

Q. Now, will you state to the jury how it is that these photographs are used in the store of The Sperry & Hutchinson Co.?

Objected to as immaterial, irrelevant and incompetent and not within the issues.

Objection overruled; exception.

59 A. Sperry & Hutchinson Co. redeems stamps that are issued to merchants, who in turn issue them to the people when they pay cash for their goods. It is the same as a cash discount. These various stamps are pasted into books, small books such as are on the table there (indicating Exhibit C), and these books, when filled, are brought to the store and redeemed; it is the same as cashing in these discounts that these people are entitled to on account of having traded with these merchants who issue them in lieu of their paying cash. These books are brought daily to our store, and we have a large assortment of premiums, and among others is a premium of a dozen photographs issued by Mr. Young. We take the book and issue a voucher which is furnished by Mr. Young, written out by Mr. Young, an order on Mr. Young. I should say these people take these vouchers and go to Mr. Young's place and get their photographs.

By the COURT:

And those who bring in the premium trading stamps select from these photographs exhibited there, such photographs as they desire. These photographs are on exhibition to show the sample of Mr. Young's work so that they may choose the style that they wish. They can select an individual photograph, but if a customer should desire a photograph of Mrs. Rhodes, it would not be furnished on application. They may have their own pictures taken but they choose the style of work from these samples.

Q. They can do that without coming to the trading stamp company, could they not? So far as you know, if a person went to Mr. Young's studio and desired some kind of a picture, he could get it without reference to your store, could he not?

A. Yes, sir.

60 Q. Some particular style or form?

A. Oh, if he wished to pay for it, but these people, rather than pay the money for it, turn in these books, and get photographs of themselves.

By Mr. JONES:

I could not tell positively without looking at the book how many orders upon Mr. Young have been given in the Sperry & Hutchinson Company's stores for photographs since 1905, but when I looked at the book the other day it showed that they had issued something over 3,000 orders on Mr. Young. It is a pretty hard question for me to say whether those orders were obtained through the instrumentality of the show case, the wall case of Mr. Young which contained the photograph, but evidently they have in a large measure come through it, because the people that come brought their books. The Sperry & Hutchinson Co. have other means of directing attention to Mr. Young's work other than the photographs which he supplied to them, such as advertisements in their books, the stamp

books, and also signs stating, I don't remember exactly, one dozen cabinet pictures in exchange for trading stamps. We have those notices put around the store. These signs direct attention to Mr. Young's or Mr. Dana's photographs. This wall case which I speak of was there for the purpose of directing attention to Sol. Young's photographs, and it contained this advertisement of Sol. Young (Referring to defendant's Exhibit No. 1).

Cross-examined by Mr. O'BRIEN:

I should say to the best of my knowledge that this picture was exhibited in the wall case. I know that picture has been mounted on card-board (indicating plaintiff's Exhibit B). I don't
61 know who removed that mounting. I know it has been removed from the mounting, it shows on the back. The necessity for that pinhole was, to put another picture over that picture, to fasten another picture over that picture. It had no connection with the mounting; it was merely to place another picture over it. I do not know exactly the size of the cardboard on which that picture was mounted. I should say that it had a margin of about two or three inches outside of that, large enough to make a margin of two inches.

DEFENDANT'S COUNSEL:

For the convenience of carrying that photograph I took it off the cardboard. The cardboard is immaterial in this case.

By Mr. O'BRIEN:

The reason that I measured the frame was that I was passing by the other morning, and I happened to have that stick in my hand and I thought that I would measure it. I have been with two other witnesses who have been called for the defense for the last two days, sitting in court. I have not talked over this case particularly with them. I have not talked over the measurement of that case with them. Not a word has passed in that direction whatever. They were not present while I was discussing the measurement of that case with my attorney. It is pretty hard to state how many people passed in and out of that store during the months of January, February, March, April and June, 1905, but I should say on the average between six and eight hundred people. Some times more, and some times less, but I think that would be a fair estimate. I was not the head manager of the store in West 23rd St. when the
62 demand was made by the plaintiff for the removal of her picture. The demand was not made of me. The manager is not in court.

Redirect examination by Mr. JONES:

I do not know where the manager is. The last I heard of him he had gone West on a pleasure trip. He has been gone some little time. I was manager at that time of the floor, the ground floor. I was not the office manager. I had charge of the floor on which this show case was, and in which the wall case was.

Recross-examination by Mr. O'BRIEN:

Mr. Clark is not now with the Company.

Defendant rests.
Testimony closed.

DEFENDANT'S COUNSEL: I move to dismiss the action on ground that it has been shown that the defendant did not ex this photograph, and on the further ground that the plaintiff shown no damage which is cognizable in law.
Motion denied.
Defendant excepts.

Counsel for the respective parties then summed up, where the Court charged the jury as follows:

BETTS, *J.*:

GENTLEMEN: During some part of the year 1905, The Sper Hutchinson Company, a Company engaged in the busi
63 of trading stamps at 23rd Street in New York City, Man tan, exhibited upon its wall and in its store there cer photographs of the plaintiff. As one of the results of that exh tion we have this action brought by the plaintiff to restrain defendant from posting such pictures and exposing them to pu gaze, and also for damages in its action in that regard. The ans of the defendant, Sperry & Hutchinson Company, in the first stance denied the use of these pictures, or of posting or exposing t to public gaze; and then in substance allege that it was done b for a Mr. Young, photographer.

This case, gentlemen, has had a partial trial in another bra of this court, by which it has been found in substance that the fendant was using the plaintiff's Mrs. Rhodes', photographs, its store and exposing them to public gaze without her written sent; and an injunction had been issued restraining it from so do so that the matter that is sent here for you to determine is amount of damages, if any, which the plaintiff has sustained reason of this use. The plaintiff testifies that she resides in city in the Borough of Brooklyn, and she is the wife of an emplo of the Bank of Commerce in Manhattan. She says that some ti I think in February, 1905, she heard for the first time throu her sister-in-law that her picture was being exposed in the store this defendant on 23rd Street. Inquiry and examination there closed that to be correct. It is claimed by her that the defenda were requested to cease exposing this picture and to withdraw it fr the public gaze and that they did not do so; that on the day June on which this complaint was sworn to, the picture
64 still there, as I recall the testimony, on exhibition. And claims that by reason of that continued exhibition she been injured in her feelings. She claims that this picture taken of her, at least one pose, in her wedding dress, not a gr while after her marriage, intended as a surprise for her husba and that only a limited number were ordered, some six, and

tributed to her relatives and immediate friends. Plaintiff claims that as a result of these pictures being exhibited there—it appears that there are two different kinds, and one of them is a different pose from the pose she ordered—she has been rendered nervous and has been humiliated and hurt in her feelings, although no money damage has been suffered by her.

The claim of the defendant is that this picture was one of several pictures exhibited in its store at the request of Mr. Young, a photographer; that there was a sort of case or board there upon which other pictures were exhibited, that this was exhibited there so that persons visiting the store might see the style of work done by this photographer, the manner in which he finished his pictures, and the different styles of pictures which he took and that they might then, if they so chose, use the trading stamps they obtained and order a picture or sets of pictures and pay for them in that way, and that that was done as an advertisement for Mr. Young. The defendant claims he had no desire to injure the plaintiff and claims further that when advised that is was distasteful and repugnant to the plaintiff to have her picture thus exposed, the picture was covered or removed from public gaze by its employees.

Now the question of damages, if any, is particularly for you, and I am going to leave it for you under the statute upon
65 which this case is brought and the rule that is provided for an assessment for fixing of damages. The statute is short. The first section is:

"A person, firm or corporation that uses for advertising purposes "or for the purposes of trade, the name, portrait or picture of any "living person, without having first obtained the written consent "of such person, or, being a minor, of his or her parent or guardian, "is guilty of a misdemeanor."

The second section, which more particularly applies to this, although it refers back to the first, is:

"Any person, whose name, portrait or picture is used within this "State for advertising purposes, or for the purposes of trade, without "the written consent first obtained as above provided, may maintain "an equitable action in the Supreme Court of this State against the "person, firm or corporation so using its name, portrait or picture "to prevent and restrain the use thereof"—that has been done, an injunction has been granted here—"and may also sue and recover "damages for any injury sustained by reason of such use, and if the "defendant shall have knowingly used such person's name, portrait "or picture in such manner as is forbidden or declared to be unlaw-"ful by this Act, the Jury in its discretion may award exemplary "damages."

By exemplary damages, gentlemen, is meant damages by way of punishment. Without regard to the humiliation that the plaintiff claims that she has suffered, or the nervousness she says has been occasioned by it, if you find that the defendant used this knowingly, as defined there by the statute, then you may award exemplary damages.

Now, that is the case submitted to you, the amount of dam-

ages, if any. The plaintiff claims $5,000 damages. The
66 defendant says she is not entitled to any damages, because she has not been injured, and because as soon as it was found that the publication or exposing of the picture was distasteful to the plaintiff the defendant removed it. That is the question for you, you are to decide that. You heard the defendant at different times make a motion for a non-suit or a dismissal of the complaint. You heard the Court deny those motions. You are not thereby to conclude that you have any idea what the Court thinks your verdict ought to be in the case. It need not make any difference to you what the Court thinks. The Court decided it was not a question of law for the Court, but a question for you from all the evidence submitted. The plaintiff comes into Court alleging an injury to her by the defendant, the Sperry & Hutchinson Company. The burden of proof is, therefore, on the plaintiff to sustain to your satisfaction by a fair preponderance of evidence that she should recover here. If you find a verdict for the plaintiff, you will state the amount in dollars and cents. If you find for the defendant, you will say we find no cause of action, or we find for the defendant.

PLAINTIFF'S COUNSEL: I would ask your Honor to charge that under the interlocutory judgment it has been found by another part of this Court, that some damage has been suffered; there is an express finding of that fact in the interlocutory judgment.

The COURT: That is true. It has been found in the judgment which the Court referred to that the plaintiff has suffered some damage in this case but no reference is made to the amount; so that leaves the amount for you, anywhere from six cents to five thousand dollars.

PLAINTIFF'S COUNSEL: I ask your Honor to charge that
67 it has already been found that by an interlocutory judgment of this Court that the photograph was exhibited for the purpose of trade or advertising between the months of January, 1905, and June, 1905.

The COURT: I think I have charged that in substance; and charge it in the language requested.

PLAINTIFF'S COUNSEL: And that any testimony offered at this trial in contradiction of that fact shall have no weight or bearing on the jury, the issue is not before them.

The COURT: I decline to charge that except as I have already charged.

Plaintiff excepts.

PLAINTIFF'S COUNSEL: And that if the jury find that a demand was made upon the defendant for the removal of this picture, the continuance of the use as found by the interlocutory judgment constitutes a knowing and willful use under the statute and would justify the assessment of exemplary damages.

The COURT: That is particularly left by the statute to the jury. I decline to charge any further than I have on that question. The statute leaves it to the jury. It says they must fix the damages and may award exemplary damages if they think it is a proper case to do so.

DEFENDANT'S COUNSEL: I ask your Honor to charge, in view of the remarks of the counsel for the plaintiff, that the jury shall give no credence to any of the remarks which he made asserting that defendant is a corporation and stating that it is only the pocket of that corporation which can be attacked. I will ask your Honor to charge that the jury shall treat this matter as if the defendant
68 in this case were an individual or firm and pay no attention to the fact that it is a corporation.

The COURT: Gentlemen, it is not a question of sympathy, of course, you all understand that, and you are not to award any damages whatever to this plaintiff because she is a lady and young, and against the defendant because it is a corporation and because you may think it has considerable means. These parties stand on an equality here before this Court the same as though they were two persons, or two corporations, and you are to treat them as such. It often happens in the progress of a trial that counsel for the different parties, zealous of performing their full duty for their client, will make statements to a jury in their opening as to what they intend to prove, which these statements of the witnesses themselves will not fully carry out. It often happens that in their zeal in the closing remarks to the jury they will recall testimony that has been given which is more fair to their client than the testimony itself would warrant. Now if any case of that kind has occurred here, you will take your recollection of the testimony and not the recollection of counsel for either side. And the Court says further, that, so far as the Court has called your attention to any particular part of the testimony, if your recollection of it differs from the Court's take yours, not the Court's, you are to take your recollection of the testimony, not what the Court may have said in general terms the testimony discloses.

DEFENDANT'S COUNSEL: I further ask your Honor to charge the fact that you have instructed the jury how to bring in the damages shall not be taken as an indication that you think the plaintiff is entitled to any damage.

The COURT: Well, I have charged that, except that I have
69 charged them that under the judgment entered here they must find some damages if it be only for six cents; the amount is entirely within their discretion between six cents and five thousand dollars. They may not exceed the amount asked, and they should not go below six cents.

DEFENDANT'S COUNSEL: The judgment is not in evidence.

The COURT: It does not make any difference; you may retire gentlemen.

The jury returned a verdict for the plaintiff for the sum of One thousand Dollars.

DEFENDANT'S COUNSEL: I move to set aside the verdict, upon the ground that it is against the evidence, against the weight of evidence, and upon all the grounds set forth in Section 999 of the Code.

Motion denied; exception.

DEFENDANT'S COUNSEL: I ask for thirty days' stay of execution and sixty days to make the case.

The COURT: Yes.

The foregoing case contains all the evidence taken, proceedings had upon the trial of this action.

Stipulation.

It is hereby stipulated that the printing of the photographs received in evidence be dispensed with, and that on the argu-
70 ment of this appeal or any appeal hereinafter taken to the Court of Appeals, either party may on the argument refer to and submit to the Appellate Court any or all of said photographs.

Dated, New York, March 22, 1907.

THOMAS E. O'BRIEN,
Attorney for Plaintiff-Respondent.
JOHN HALL JONES,
Attorney for Defendant-Appellant.

EXHIBIT A.

Exhibit A was an original photograph of plaintiff of cabinet size. The only matter on the picture describing it was:

"Studio
17 Union Square
Sol. Young."

EXHIBIT B.

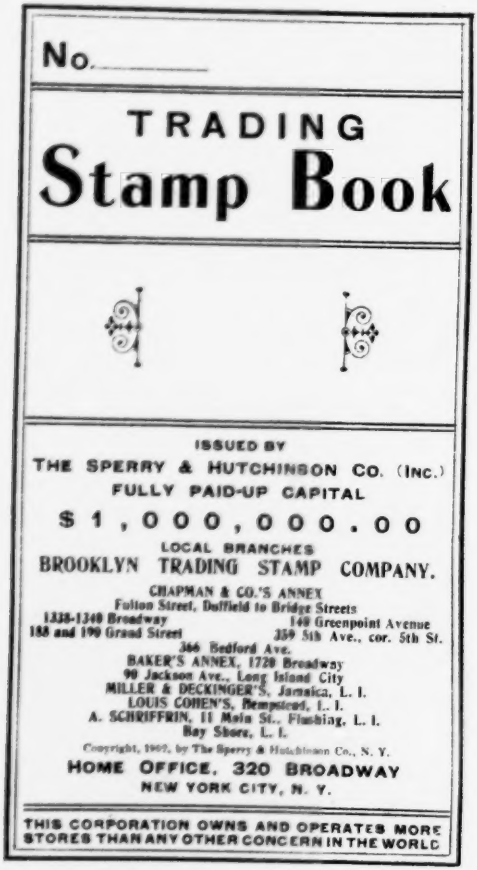
Exhibit B was an original photograph of this plaintiff which had been removed from the cardboard on which it was mounted and was 5 inches wide by 7½ inches long.

(Here follow fac-similes marked pages 71 and 72.)

Exhibit C.

211

Exhibit C is a trading stamp book 2½ inches by 5 inches and on outside of the front cover was printed the following:—



212

213

On the other side of said cover was printed the following:

214

NOTICE

THIS book and the trading stamps which are issued by the undersigned are so issued, and are received by you, pursuant to certain restrictions and limitations concerning their use contained in the written contracts made for your benefit between the undersigned and the merchants from whom you receive the same. Neither the books nor the stamps are sold to you or the merchant, the title thereto being expressly reserved in the undersigned. They are merely loaned to you. The only right which you acquire in said stamps is to paste them in books like this and present them to us for redemption. You must not dispose of them, or make any other use of them without our consent in writing. We will in every case, where application is made to the undersigned, give you permission to turn over your stamps to any other bona fide collector of "S. & H." Green Trading Stamps; but if the stamps or the books are transferred without our consent, we reserve the right to restrain their use by, or take them from other parties. It is to your interest that you fill the book and personally derive the benefit and advantage of exchanging it for your choice of the many useful and valuable articles supplied by us.

215

These stamps when received by you must be pasted in the book, as that is a method we have adopted for the purpose of preventing their further use as an advertising medium.

Brooklyn Trading Stamp Company,

THE SPERRY & HUTCHINSON CO., Prop.

PAID-UP CAPITAL, $1,000,000.00

This book is loaned to

Name .....

216

Address .....

73 After which came an explanation which is as follows:

EXPLANATION.

THE object of "S. & H." GREEN Trading Stamps is to enable the merchants who give them to sell their goods for *cash* instead of upon credit. By paying cash, therefore, you will be entitled to "S. & H." GREEN Trading Stamps; one stamp for each ten cents represented in a purchase—that is to say, the number of stamps you receive will be equal to the number of times "ten" is contained in the amount of your cash purchase.

Thus, "S. & H." GREEN Trading Stamps are a benefit to both buyer and seller. The merchant saves the inevitable losses through bad accounts. He gets his money promptly, is enabled to discount his bills, and, having cash, can buy cheaper than upon credit.

By paying cash you are equally benefited. You also can buy cheaper. You also can obtain a discount—in the way of "S. & H." GREEN Trading Stamps—which may be taken to our store and exchanged for an endless variety of goods.

By exerting just a little care in trading where "S. & H." GREEN Trading Stamps are given, it takes but a short time to fill a book with them (33 pages, 30 stamps on a page). The result is that, with no greater expenditure for your needs, perhaps less, you gradually accumulate a great many things, useful and ornamental, which have cost you absolutely nothing, but which you otherwise would not have possessed unless you had paid cash for them.

See back page of cover for partial list of goods given for "S. & H." GREEN Trading Stamps.

The better way for you to do is to call at our local branch store and see for yourself. Make all the inquiries you desire. We sell nothing—everything in our store is given in exchange for "S. & H." GREEN Trading Stamps only. The attendants there have nothing to do but to show you goods and answer questions.

Yours truly,

THE SPERRY & HUTCHINSON COMPANY.

On the following two pages was a translation of this explanation into French and German. After which came an advertisement which preceded a directory containing the names of the dealers in art needlework, bicycles and cycle supplies, boots and shoes, carpets, oilcloths and linoleums, cigars and stationery, tobacco, clothing,
crockery, glassware and lamps, confectionery, cutlery, drugs,
74 dry goods, fish, oysters and clams, furs, furniture, fruits and vegetables, gentlemen's furnishings, groceries, butter, cheese and eggs, hardware and house furnishings, hats, canes and umbrellas, hosiery and underwear, jewelry and silver novelties, lager beer, wines and liquors, linings, dress trimmings, meats and provisions,

millinery, musical instruments, newspapers, notions, fancy dry goods and toys, paints, oils and varnishes, photograph supplies and cameras, picture frames and mouldings, soda water, teas and coffees, trunks, upholstery, and of bakers, caterers, barbers, delicatessen store proprietors, florists, tailors, launderers, opticians and photographers in Brooklyn and other cities, towns and villages in Long Island who gave trading stamps of the Sperry & Hutchinson Company, the total number of cities, towns and villages being 77, and the total number of merchants over 2,300.

After this directory were 31 pages divided into 30 spaces so that trading stamps could be conveniently pasted therein.

(Here follow fac-similes marked pages 75 and 76.)

On the first of said pages the following was printed:

Start	on	this	page.	Place
the	Trading	Stamps	you	receive
from	your	Merchant in		these
squares.	When	this	book	is
filled,	come	to	the	store
and	take	your	Selection.	

After the 31st page there was printed on the inside of the back cover, as follows:

No .....

M .....

.....

REDEEMED BY

M..... .....

.....

Date ....

Article..... .....

77 On the outside of the back cover was printed the following:

A WORD TO YOU

FOR many years we have made a study of the public's requirements. It is not necessary to say that we understand the importance of supplying you, as nearly as possible, with just what you desire; nor to say that the immense quantity of goods purchased by us each year naturally places at our disposal the wares of the best manufacturers and designers in every part of the world. These facts you already understand. Be assured that, if you collect "S. & H." GREEN Trading Stamps, you cannot fail to obtain something in exchange for them that will thoroughly satisfy you.

IT is hardly possible for us to enumerate on this page, the entire line of goods which can be had in exchange for "S. & H." GREEN Trading Stamps. Among them, however, are the following:

FURNITURE, ART SQUARES, RUGS, LACE CURTAINS, BOOKCASES, VASES, JARDINIERES, ONYX TABLES, CLOCKS, WATCHES, OPERA GLASSES, CHINA, CUT GLASS, MUSICAL INSTRUMENTS, LAMPS, CARVING SETS, KNIVES, FORKS, SPOONS, ANYTHING AND EVERYTHING IN SILVERWARE, ETC., ETC.

Yours very respectfully,
THE SPERRY & HUTCHINSON CO.

78 EXHIBIT No. 1.

Exhibit No. 1 was a cardboard sign 27½ inches wide by 22½ inches high, upon which was printed the following:

Sol. Young

Photographer

Studios

Broadway
Cor. 15th St. N. Y.
597-599 Fulton St. Brooklyn.

1204 Broadway
Bet. 29th & 30th St. N. Y.

Order Denying Motion for a New Trial.

At a Trial Term of the Supreme Court of the County of Kings, Part IV thereof, held at the County Court House in the County of Kings on the 28th day of November, 1906.

Present: Hon. James A. Betts, Justice.

AIDA T. RHODES, Plaintiff,
vs.
THE SPERRY AND HUTCHINSON COMPANY, Defendant.

79 The trial of the issue of damages in the above-entitled action having been brought on before Mr. Justice James A. Betts, and a jury at Trial Term, Part IV of this court, on the 27th and 28th days of November, 1906, and the jury having rendered their verdict in favor of plaintiff and against the defendant for the sum of $1,000, and the Justice presiding at the trial aforesaid having heard the motion made on the minutes on behalf of the defendant to set aside a verdict, and for a new trial to be granted upon the exceptions taken during the trial and upon the ground that a verdict was against the evidence, against the weight of evidence and contrary to law, and upon all the grounds set forth in Section 999 of the Code of Civil Procedure, and upon the further ground that Section 2 of Chapter 132 of the Laws of 1903, the section upon which this action is based contemplates the bringing of two actions, one for an injunction, etc., and another to recover damages for injuries sustained; and after hearing John Hall Jones, counsel for the defendant, in support of said motion, and Thomas E. O'Brien, counsel for the plaintiff in opposition thereto; now, on motion, of Thomas E. O'Brien, attorney for plaintiff, it is

Ordered that the defendant's said motion be and the same is hereby in all respects denied.

Enter,

JAMES A. BETTS, *J. S. C.*

80 *Affidavit of No Opinion.*

STATE OF NEW YORK,
County of New York, ss:

Frank P. Nolan, being duly sworn, deposes and says: That he is an attorney and counsel at law and managing clerk in the office of John Hall Jones, the attorney for the defendant herein. That no opinion other than the findings of fact and conclusions of law therein were handed down by the Presiding Justice in making his decision herein. Deponent further says that no opinion was handed down by the Presiding Justice in deciding defendant's motion for a new trial.

FRANK P. NOLAN.

Sworn to before me this 4th day of March, 1907.
E. B. WRIGHT,
Notary Public, Kings County, New York.

Certificate filed in New York County.
Commission expires March 30th, 1908.

Stipulation.

It is hereby stipulated and agreed that the foregoing case contains all the evidence given upon the trial of this action and that the same be settled and ordered to be filed and annexed to the judgment roll herein.

Dated New York, March 22, 1907.

THOMAS E. O'BRIEN,
Attorney for Plaintiff.
JOHN HALL JONES,
Attorney for Defendant.

81 ***Order.***

Pursuant to the foregoing stipulation, the foregoing case is hereby settled and ordered on file and annexed to the judgment roll herein.

Dated, New York, March 25, 1907.

JAMES A. BETTS, *J. S. C.*

Waiver of Certification

Pursuant to Section 3301 of the Code of Civil Procedure, it is hereby stipulated that the foregoing consists of true and correct copies of the notice of appeal, the judgment roll and the case and exceptions as settled, and the whole thereof now on file in the office of the Clerk of the County of Kings, and that certification thereof by the Clerk of the said County pursuant to Section 1353 of the Code of Civil Procedure is hereby waived.

It is further stipulated that a copy of the printed case on appeal herein be filed in lieu of the engrossed copy required by the Rules.

Dated New York, March 22, 1907.

THOMAS E. O'BRIEN,
Attorney for Plaintiff-Respondent.
JOHN HALL JONES,
Attorney for Defendant-Appellant.

82 *Order Filing Case in Appellate Division.*

Pursuant to Section 1353 of the Code of Civil Procedure, it is

Ordered, that the foregoing printed record be filed in the office of the Clerk of the Appellate Division for the Second Judicial Department.

Dated, New York, March 25, 1907.

JAMES A. BETTS, *J. S. C.*

Enter:

83 *Order of Affirmance.*

At a Term of the Appellate Division of the Supreme Court held in and for the Second Judicial Department at the Borough of Brooklyn, on the 7th Day of June, 1907.

Present—Hon. Hon. John Woodward,
" " Almet F. Jenks,
" " Warren B. Hooker,
" " William J. Gaynor,
" " Adelbert P. Rich, *Justices.*

AIDA T. RHODES, Plaintiff-Respondent,
vs.
THE SPERRY & HUTCHINSON COMPANY, Defendant-Appellant.

Order of Affirmance on Appeal from Judgment.

The above named The Sperry & Hutchinson Company, the defendant in this action having appealed to the Appellate Division of the Supreme Court from a judgment of the Supreme Court entered in the office of the Clerk of the County of Kings on the 30th day of November, 1906, and from an order made by said Court denying a motion for a new trial therein, and the said appeal having been argued by Mr. John Hall Jones, of Counsel for the appellant and by Mr. Thomas E. O'Brien of Counsel for the respondent, and
84 due deliberation having been had thereon, and the Court having unanimously decided that the verdict of the jury is supported by the evidence.

It is hereby ordered and adjudged that the judgment and order so appealed from be and the same are hereby affirmed; and that the respondent recover of the appellant the costs of this appeal.

Enter:

ALMET F. JENKS,
Acting P. J.

Certification.

Supreme Court, Appellate Division, Second Judicial Department.

Clerk's Office, Borough of Brooklyn, N. Y.

I, John B. Byrne, Clerk of the Appellate Division of the Supreme Court in the Second Judicial Department, do hereby certify that the foregoing is a copy of the order made by said court upon the Appeal in the above entitled action or proceeding, and entered in my office on the 7th day of June, 1907, and that the original case or papers upon which said appeal was heard are hereunto annexed.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, at the Borough of Brooklyn, this 7th day of June, 1907.

[SEAL.] JOHN B. BYRNE, *Clerk.*

85 *Judgment of Affirmance....*

Supreme Court, King's County.

AIDA T. RHODES, Plaintiff,
against
THE SPERRY & HUTCHINSON COMPANY, Defendant.

The defendant having appealed to the Appellate Division of this Court for the Second Department from a judgment herein entered in the office of the Clerk of the County of Kings on the 30th day of November, 1906, in favor of the plaintiff and enjoining and restraining the defendant from using plaintiff's pictures or photographs, or any of them, for purposes of trade or advertising, and further directing that the plaintiff recover of the defendant the sum of One thousand two hundred and thirty and 61/100 ($1,230.61) dollars, and the defendant having perfected its return on said appeal and filed the same in the office of the Clerk of the said Appellate Division, and the said appeal having been heard by the said Appellate Division, and the said Appellate Division having unanimously ordered that the said judgment be affirmed with costs, and a certified copy of said order having been remitted to the Clerk of the County of Kings together with the said return by the Clerk of said Appellate Division,

86 Now, on motion of Thomas E. O'Brien, attorney for the plaintiff, it is

Ordered, adjudged and decreed that the said final judgment so enjoining and restraining the defendant from using the plaintiff's pictures or photographs for purposes of trade or advertising, and for the sum of One thousand two hundred and thirty and 61/100 ($1,230.61) Dollars in favor of the plaintiff Aida T. Rhodes and against the defendant The Sperry & Hutchinson Company be, and the same hereby is unanimously affirmed; and it is further

Ordered, adjudged and decreed that the plaintiff, Aida T. Rhodes do recover of the defendant The Sperry & Hutchinson Company the sum of Ninety-four and 64/100 ($94 64/100) Dollars, her costs and disbursements as taxed, and do have execution therefor.

Dated July 5, 1907.

CHARLES T. HARTZHEIM, *Clerk.*

87 *Opinion of Appellate Division.*

Supreme Court, Appellate Division, Second Judicial Department.

Woodward, Jenks, Hooker, Gaynor and Rich, JJ.

AIDA T. RHODES, Respondent,
against
THE SPERRY & HUTCHINSON COMPANY, Appellant.

Appeal by the defendant from a judgment of the Supreme Court, entered in the office of the Clerk of the County of Kings on the 30th day of November, 1906, in favor of the plaintiff; also from an order entered in the same office on the 14th day of December, 1906, denying defendant's motion for a new trial.

John Hall Jones, for the appellant.
Thomas E. O'Brien, for the respondent.

JENKS, J.:

This action is brought under chapter 132 of the Laws of 1903, entitled "An Act to prevent the unauthorized use of the name or picture of any person for the purposes of trade." In June, 1904, the plaintiff sat in various poses for her photograph to Mr.
88 Young. She accepted and paid for some of them. In November, 1904, Mr. Young made a contract with the defendant whereby he agreed to take photographs for collectors of the defendant's trading stamps. The defendant who was a promoter of this scheme of trade kept an office in West 23rd Street in the borough of Manhattan, whereat it displayed specimens of the work of the various tradesmen who were associated with this scheme. There was a wall case and a counter show case in the office and therein were displayed various photographs, the work of Mr. Young, with a placard of his calling and place of business. There were about 40 photographs furnished by Mr. Young. Among them were several photographs of the plaintiff—one in the wall case, and two in the show case. This office was visited daily by many people. The plaintiff never consented in writing or otherwise to this exhibition. The plaintiff gained an interlocutory judgment after trial at Special Term which was affirmed by us (114 App. Div., 290). The question of damages was thereafter tried before a jury who returned a verdict of $1,000. This appeal is from the final judgment enjoining the defendant from use of the photographs for trade or advertisement, and awarding such damages. The appellant contends

(1) that there is no evidence that the photographs were exhibited by the defendant for any purpose, (2) that there were errors in the rulings of the court, (3) that the damages are excessive and (4) that the statute is unconstitutional. The 1st and 4th propositions were specifically presented upon the former appeal, and I need not consider them. There remain, then, for consideration the contentions (1) that the court erred in its rulings, and (2) that the damages are excessive.

89 1. Three rulings are criticized: (*a*) The court refused to permit a question to Mr. Young whether he had exhibited the photograph in the shop of the defendant. The Special Term whose judgment we affirmed ut supra found that the defendant was using, displaying the pictures or photographs of the plaintiff for advertising purposes. Whether Mr. Young in his opinion had made the exhibition did not materially affect the act of the defendant or its liability therefor. (*b*) The court refused under objection to permit the question whether Mr. Young made a contract with the defendant whereby he was allowed to display his pictures. Whether or not there was a contract between Mr. Young and the defendant could not qualify the defendant's own act in its relation to the plaintiff. And moreover the evidence is that the defendant had issued 3,000 orders on Mr. Young which were in a large measure due to this exhibition in the office of the defendant. Further, the defendant was permitted to show that Mr. Young caused the photograph to be put in the frame and that his servant hung them in the defendant's shop. (*c*) As to the third question, it suffices that the answer is upon the record with full force.

2. It seems to me, however, that the damages are excessive. The learned court charged the jury that they could give exemplary damages, and as there is no indication to the contrary in the verdict I cannot say that the verdict does not embrace both kinds of damages. It is true that in actions of wilful tort damages may be awarded for mental distress, humiliation and the mortification alone (Preiser v. Wielandt, 48 App. Div., 569; Smith v. Leo, 92 Hun, 242). The plaintiff has testified that this act com-

90 plained of "humiliated" her, "made he nervous" and "upset her," and such testimony might naturally be credited by a jury. And the circumstances are somewhat different from a display by a photographer in his own show window. For these photographs, though shown as specimens of a photographer's art, were exhibited in the promotion of a catch-penny scheme, somewhat in the nature of giving a customer more than the same money would obtain at ordinary purchase. That difference may be illustrated by a bit of testimony in the case. The plaintiff testifies that a woman relative (evidently "a candid friend") came to her, "kind of laughed satirically, and she said, 'I saw your picture in Sperry's trading stamp store; that is very funny.'" On the other hand, the act complained of in no way reflected upon the character or reputation of the plaintiff, as would a slander or libel, or personally humiliated her in the presence of others. It does not appear that her picture was associated with other pictures which were objec-

tionable because of the appearance thereof or of the character or standing of the subjects. And the plaintiff is quick to admit that neither her reputation nor social standing has been affected in the slightest degree. I am justified in the conclusion that the measure of compensation for the injury need not be very large. Exemplary damages are expressly afforded by the statute if the defendant shall have "knowingly used" the portrait or picture. Obviously "knowingly" means if the offender knows that the portrait or picture is that of a living person. No question was raised as to this feature of the statute and the evidence is clear enough that the defendant made the display after he had been informed that the pic-
91 ture was that of a living person. The offense, though within the purview of the statute, is not as flagrant as if the defendant had knowingly displayed the picture to exploit a brand of cigars, or an article of dress or some food product so that the picture as part of a distinctive label might be distributed broadcast for display in all sorts of public places or shops. The defendant might well have supposed that as displays of photographs in photographer's show cases were usual, that there would be no objection to this display, without the nicety to draw a distinction against its own calling that others might naturally see. So that really the main offending which called for the imposition of exemplary damages was in the continuance of the display after the husband of the plaintiff remonstrated with it. That course was not in defiance, for the plaintiff's husband and another witness testify that the defendant's manager expressed his regret, and promised to notify Mr. Young immediately to replace the pictures with others. There is some evidence that the defendant intended or sought to comply with the request. The object of exemplary damages is not to compensate the plaintiff, but rather to punish the defendant and to deter him and others from like acts (Hamilton v. Third Avenue R. R. Co., 53 N. Y., 25). Considering, then, both elements of damage as embraced in the verdict, I think that full justice will be meted out if the damages are reduced to $300. My brethren do not concur in my views as to a reduction, and therefore the order and judgment are affirmed, with costs.

92 *Waiver of Certification.*

It is hereby stipulated that the foregoing are correct copies of the notice of appeal to the Court of Appeals, the order appealed from, and all the papers upon which the Appellate Division of the Supreme Court, Second Department, acted in making the said order and certification thereof pursuant to Sections 1353 and 3301 of the Code of Civil Procedure or otherwise, is hereby waived.

Dated, New York, September 16, 1907.

THOMAS E. O'BRIEN,
Attorney for Plaintiff-Respondent.
JOHN HALL JONES,
Attorney for Defendant-Appellant.

O. K.,
A. B. A.

STATE OF NEW YORK,
County of Kings, ss:

I, Frank Ehlers Clerk of the County of Kings, and Clerk of the Supreme Court of the State of New York, in and for said County, (said Court being a Court of Record,) do hereby certify that I have compared the annexed with the original case on appeal filed in my office Oct. 27, 1908, and that the same is a true transcript thereof, and of the whole of such original.

In testimony whereof, I have hereunto set my hand and affixed the seal of said County and Court this 16 day of Nov., 1908.

FRANK EHLERS, *Clerk.*

[Seal Kings County.]

93 Supreme Court. Kings County.

AIDA T. RHODES, Plaintiff,
against
THE SPERRY & HUTCHINSON COMPANY, Defendant.

A final judgment in this action in favor of the plaintiff against the defendant having been rendered in this Court November 30, 1906, enjoining the defendant from using plaintiff's pictures or photographs for purposes of trade or advertising and for the sum of $1230.61 and the defendant having appealed from said judgment to the Appellate Division of this Court for the Second Department and the said judgment having been affirmed in all things by this Court at said Appellate Division and judgment of affirmance having been rendered thereon July 5, 1907 and that the plaintiff recover against the defendant $94.64 costs of said appeal; and the defendant having appealed therefrom to the Court of Appeals and the said Court of Appeals having sent hither its remittitur filed herein October 27, 1908, by which it appears that the said Court of Appeals has affirmed the said judgment in all things with costs and has given judgment accordingly and has remitted the judgment of said Court of Appeals to this Court to be enforced according to law, and this Court having by an order duly entered herein October 26, 1908, ordered that said judgment be made the judgment of this Court and

94 the plaintiff's costs having been duly taxed at the sum of One Hundred Seventy-four 41/100 Dollars ($174.41).

Now on Motion of Thomas E. O'Brien, Attorney for the plaintiff, it is adjudged

That the said order and judgment of the Court of Appeals be and the same hereby are made the order and judgment of this Court and that the plaintiff Aida T. Rhodes recover of the defendant The Sperry & Hutchinson Company the sum of One Hundred Seventy-four 41/100 Dollars ($174.41) costs.

Dated, October 27, 1908.

FRANK EHLERS, *Clerk.*

O. K.
A. B. A.
7—128

STATE OF NEW YORK,
County of Kings, ss:

I, Frank Ehlers, Clerk of the County of Kings, and Clerk of the Supreme Court of the State of New York in and for said County, (said Court being a Court of Record,) do hereby certify that I have compared the annexed with the original judgment filed in my office Oct. 27, 1908 and that the same is a true transcript thereof, and of the whole of such original.

In testimony whereof I have hereunto set my hand and affixed the seal of said County and Court this 16 day of Nov., 1908.

FRANK EHLERS, *Clerk.*

[Seal Kings County.]

95 Sir: You will please take notice of a judgment of which the within is a copy this day entered in the office of the Clerk of the County of Kings.

Dated, Oct. 27, 1908.

Yours, &c.

THOMAS E. O'BRIEN,
Pl'ff's Att'y,
Office & P. O. Address, 32 Nassau St., N. Y.

To John Hall Jones, Esq., D'f'ts Att'y.

[Endorsed:] Supreme Court, Kings County. Aida T. Rhodes, Plaintiff, against The Sperry & Hutchinson Company, Defendant. Judgment and Notice of Entry. Thomas E. O'Brien, Attorney for Plaintiff, 32 Nassau Street, City of New York. To John Hall Jones, Esq., D'f't's Att'y. 10-27-1908.

96 At a Special Term for Motions of the Supreme Court Held in and for the County of Kings at the County Court House in said County on the 26th Day of October, 1908.

Present: Hon. Luke D. Stapleton, Justice.

AIDA T. RHODES, Plaintiff,
against
THE SPERRY & HUTCHINSON COMPANY, Defendant.

The above named defendant having appealed to the Court of Appeals of the State of New York from the final judgment entered and filed in the office of the clerk of the County of New York on the 5th day of July, 1907, whereby it was adjudged that the judgment entered in this action on the 30th day of November, 1906, enjoining and restraining the defendant from using plaintiff's pictures or photographs for purposes of trade or advertising, and for the sum of $1,230.61 and whereby it was further adjudged that the plaintiff recover of the defendant the sum of $94.64 costs.

And the said appeal having been duly argued at the Court of Appeals and after due deliberation, the Court of Appeals having ordered

and adjudged that the said judgment so appealed as aforesaid be affirmed with costs, and having further ordered and adjudged that the proceedings therein be remitted to the Supreme Court
97 there to be proceeded upon according to law,

Now *On Reading and Filing* the remittitur from the Court of Appeals herein and upon motion of Thomas E. O'Brien, attorney for plaintiff, it is.

Ordered that the said order and judgment of the Court of Appeals be and the same hereby are made the order and judgment of this Court.

Enter

L. D. S., *J. S. C.*

Granted Oct. 26, 1908.

FRANK EHLERS, *Clerk.*

O. K.,
A. B. A.

STATE OF NEW YORK,
County of Kings, ss:

I, Frank Ehlers, Clerk of the County of Kings, and Clerk of the Supreme Court of the State of New York in and for said County, (said Court being a Court of Record,) do hereby certify that I have compared the annexed with the original judgment filed in my office Oct. 27, 1908 and that the same is a true transcript thereof, and of the whole of such original.

In testimony whereof I have hereunto set my hand and affixed the seal of said County and Court this 16 day of Nov., 1908.

FRANK EHLERS, *Clerk.*

[Seal Kings County.]

98 Sir: You will please take notice of an order of which the within is a copy this day entered in the office of the Clerk of the County of Kings.

Dated Oct. 27, 1908.

Yours, &c.,

THOMAS E. O'BRIEN,
Pl't'f's Att'y, Office & P. O. Address 32 *Nassau St., N. J.*

To John Hall Jones, Esq., Def't's Att'y.

[Endorsed:] Supreme Court, Kings County. Aida T. Rhodes, Plaintiff, against The Sperry & Hutchinson Company, Defendant. Order on Remittitur and Notice of Entry. Thomas E. O'Brien, Attorney for Plaintiff, 32 Nassau Street, City of New York. To John Hall Jones, Esq., Def't's Att'y. 10-27-1908.

99 AIDA T. RHODES, Respondent,
v.
THE SPERRY AND HUTCHINSON COMPANY, Appellant.

(Decided October 23, 1908.)

Appeal by the defendant from a judgment of the Appellate Division of the Supreme Court in the Second department, entered on the 5th day of July, 1907, affirming a judgment of the Supreme Court in Kings county enjoining the defendant from using pictures or photographs of the plaintiff for purposes of trade or advertising and awarding damages to the plaintiff for injuries sustained by reason of such use of her portrait.

The action was brought under the second section of chapter 132 of the Laws of 1903. That statute reads as follows:

"An Act to prevent the unauthorized use of the name or picture of any person for the purposes of trade (Passed April 6, 1903).

"SECTION 1. A person, firm or corporation that uses for advertising purposes, or for purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor, of his or her parents or guardians, is guilty of a misdemeanor.

"SECTION 2. Any person whose name, portrait or picture is used within this State for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the Supreme Court of this State against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use, and if the defendant shall have knowingly used such person's name, portrait, or picture in such manner as is forbidden or declared to be unlawful by this act, the jury, in its discretion, may award exemplary damages.

"SECTION 3. This act shall take effect September 1st 1903.

Upon the trial of the action at Special Term the court made the following findings of fact:

"I. That the defendant is a foreign corporation organized under the Laws of the State of New Jersey.

"II. That the defendant is engaged in the business of issuing and redeeming trading stamps and at the time this action was begun, and for some time prior thereto, the defendant occupied the premises Numbers 152 to 154 West Twenty-third Street, Borough of Manhattan, The City of New York, and used the same as an office for the exhibition of premiums obtainable upon the surrender of trading stamps issued by the defendant.

"III. That the defendant at the time when this action was begun, and for some time prior thereto, was using exhibiting and displaying in said office of the defendant, pictures or photographs of the plaintiff in different poses, as premium exhibits and for the purpose

of advertising the benefits conferred on the holders of trading
100 stamps issued by defendant and to acquire a larger trade and custom by such use, exhibition and display.

"IV. That the plaintiff has never consented in writing or otherwise to the use, exhibition or display of her picture or photograph.

"V. That the plaintiff has suffered damages by the defendant's use of her picture or photograph as above set forth."

Upon these findings of fact an interlocutory judgment was rendered enjoining the defendant from using the plaintiff's pictures or photographs for purposes of trade or advertising and directing an assessment of her damages at a Trial Term, where she obtained a verdict of $1,000. The final judgment entered upon this verdict has been unanimously affirmed by the Appellate Division.

Learned Hand for appellant.

Thomas E. O'Brien for respondent.

WILLARD BARTLETT, *J.*:

In the case of Roberson v. Rochester Folding Box Co. (171 N. Y. 538) this court determined that in the absence of any statute on the subject the right of privacy as a legal doctrine enforcible in equity did not exist in this state so as to enable a woman to prevent the use of her portrait by others for advertising purposes without her consent. In the prevailing opinion in that case, however, Chief Judge Parker suggested that the right of privacy to that extent might properly be protected by an act of the legislature, saying: "The legislative body could very well interfere and arbitrarily provide that no one should be permitted for his own selfish purpose to use the picture or the name of another for advertising purposes without his consent."

Chapter 132 of the Laws of 1903 was passed at the very next session of the legislature after this judicial utterance was made public and there can be little doubt that its enactment was prompted by the suggestion which I have quoted. We are now asked to reverse the judgment in this action based on that statute on the ground that its enactment was not a valid exercise of the power of the legislature under the Constitution of the State of New York and on the further ground that it is violative of the Constitution of the United States.

It is contended that the act in question violates the State Constitution: (1) Because it deprives persons of liberty without due process of law; and (2) Because it deprives persons of property without due process of law. It is contended that it violates the Federal Constitution because it impairs the obligation of contracts.

As to the first objection, it is to be observed that the statute does not deny the right of any person to make such use of his own portrait as he may see fit. The legislature has not undertaken to restrict his liberty in this respect to any extent whatever. It is only the use of his name or picture by others and by others for particular
101 purposes that is affected by the statute. Unless we are bound to assume that there is an inherent right in the public at large to use the names and portraits of others for advertising or trade purposes without their consent, the legislative restriction of their liberty imposed by this act is not an exercise of power which affords

the basis of any valid objection in a court of justice. The statute merely recognizes and enforces the right of a person to control the use of his name or portrait by others so far as advertising or trade purposes are concerned. This right of control in the person whose name or picture is sought to be used for such purposes is not limited by the statute. The requirement of his written consent in order to effectuate a valid transfer of the privilege of thus using his name or portrait is not any more liable to constitutional objection than the requirement of the Statute of Frauds that an executory contract for the sale of personal property exceeding $50 in price must be made in writing in order to be enforcible.

The power of the legislature in the absence of any constitutional restriction to declare that a particular act shall constitute a crime or be actionable as a tort cannot be questioned, where the right established or recognized and sought to be protected is based upon an ethical sanction. Such is the character of the right of privacy preserved by legislation protecting persons against the unauthorized use of their names or portraits in the form of advertisements or trade notices. It is a recognition by the law-making power of the very general sentiment which prevailed throughout the community against permitting advertisers to promote the sale of their wares by this method, regardless of the wishes of the persons thereby affected. There was a natural and widespread feeling that such use of their names and portraits in the absence of consent was indefensible in morals and ought to be prevented by law. Hence the enactment of this statute.

It is not a valid objection to the act of 1903 that it creates a right of action and imposes a liability unknown to the common law. "There is no such limit to legislative power. The legislature may alter or repeal the common law. It may create new offenses, enlarge the scope of civil remedies and fasten responsibility for injuries upon persons against whom the common law gives no remedy." (Berthold v. O'Reilly, 74 N. Y. 509, 524.) Nor can the statute be deemed unconstitutional because it converts what has heretofore been an innocent act into a criminal offense. "The power of the legislature to define and declare public offenses is unlimited, except in so far as it is restrained by constitutional provisions and guaranties." (People v. West, 106 N. Y. 293.) The Civil Damage Act of 1873 was held to be constitutional by this court, notwithstanding the fact that it created a cause of action previously non-existent; and so far as I know no one has ever questioned the validity of chapter 219 of the Laws of 1871, which provides that an action may be maintained by a female to recover damages for words spoken imputing unchastity to her, without the necessity of proving
102 special damage, although no such action was maintainable prior to the enactment of that statute. But much the most notable instance of the legislative creation of a right of action non-existent at common law is the statute giving a cause of action to the personal representatives of a decedent for wrongfully causing his death. No such right existed under the common law or in England until the middle of the last century. Laws of this character now

exist in every state of the Union. The aggregate of the recoveries under these statutes must be enormous; yet their constitutionality has never been chalenged.

While it appears to be conceded by counsel for the appellant that the legislature may declare any act to be a private tort which it may declare to be a public offense, the requirement of a written consent to authorize the use of one's name or portrait by others for advertising or trade purposes is denounced as an interference with personal liberty "without due process of law." I am unable to see that this requirement is any more objectionable than was that in the statute under consideration in the case of People v. Cannon (139 N. Y. 32) commonly known as the Bottling Act. That statute declared it to be unlawful for any person to fill with beverages or medicine any marked bottle without the written consent of the person or corporation whose mark or device had been placed upon the bottle, and it was construed to be constitutional in all respects. It would not be difficult to refer to many examples of legislation in which the right to a civil remedy was made dependent upon the absence of consent in behalf of the party claiming to be injured. Thus, the copyright laws of the United States prescribe the forfeiture of a book published in violation thereof, and permit a civil action for damages only where the publication of the copyrighted work is made "without the consent of the proprietor of the copyright first obtained in writing signed in the presence of two or more witnesses." (Rev. Statutes of the U. S. sec. 4964.)

The second objection presented for our consideration is that the statute in question is unconstitutional because it applies indifferently to pictures made before and after the enactment, and hence deprives third persons who may own such pictures of their property without due process of law.

In support of this objection it is suggested that a person may have acquired the absolute ownership of a portrait before the act of 1903 was passed—at a time when he had the right to use it for advertising purposes under the decision of this court in Roberson v. Rochester Folding Box Co. (*supra*). The statute, it is said deprives him of the right thus to use it any longer and, hence, to that extent by limiting its usable quality deprives him of his property.

A sufficient answer to this argument is that the act is wholly prospective in its operation and, hence, does not apply to previously acquired pictures at all. Upon portraits the ownership of which was in others at the time when the act took effect its provisions are inoperative. Such pictures the owner is still at liberty to use
103 for advertising or trade purposes without being held thereby to have been guilty of a crime or to have committed a tort. His property rights therein are unaffected by the statute. On the other hand, as to pictures whose ownership remained in the person represented at the time when the act took effect or portraits subsequently made, a transfer of ownership no longer conveys the right to use the picture for advertising purposes unless the written consent of the person portrayed shall have been given. The acquisition of such pictures by itself does not carry with it the right to use

them for advertising or trade purposes except with the written consent of the person represented; but the statute in no wise forbids the transfer of the right so to use them, provided that right is conferred by a written consent to that effect. In other words, there is nothing in the act to prevent the transfer of this right by the subject of the picture to another. It merely requires that such transfer shall be evidenced by writing. In this respect the statute is no more subject to criticism than is the act providing for the short form of deeds, which declares what the language of certain covenants therein contained shall import. The parties are still at liberty to use further language either extending or limiting the import given to the words by the statute.

It is argued that the case of Wynehamer v. People (13 N. Y. 378) prevents us from holding that chapter 132 of the Laws of 1903 was not intended to apply to pictures in existence and owned by others than the person represented when the statute went into effect. I can find no such constraint in the doctrine of that decision. The statute there under consideration was plainly intended to destroy the property rights in all intoxicating liquors in this state, with a few insignificant exceptions, and in that view there was no room to hold that part of the act could be saved as not applicable to such property. Here, however, the purpose of the act of 1903 is obviously to prevent the unauthorized use for advertising or trade purposes of personal names and of pictures the ownership of which had not been parted with by the persons represented; and it would only be by a forced construction that it could be held to apply to pictures already in existence and owned by others. The act is, therefore, subject to the general rule, that unless a contrary intention clearly appears a law operates only in the future and upon future transactions. There is no occasion for applying the rule which permits a court sometimes to hold that one part of a statute is unconstitutional and another constitutional. We merely refuse to adopt a construction which would make it bad in part. It is wholly prospective in its operation and, therefore, wholly good.

As to the objection under the Federal Constitution that chapter 132 of the Laws of 1903 has the effect of impairing the obligation of contracts, it is sufficient to say that — is impossible to imagine how any statute can impair the obligation of contracts not existing at the time of its enactment but to be entered into in the future.

104 There is considerable discussion in the briefs submitted upon this appeal as to the relative rights of photographers and those who procure their photographs to be taken; but these matters are immaterial to the real issues presented by this record and we do not deem it necessary to discuss them. Many possible inconveniences are also suggested as liable to occur in consequence of the enforcement of the act of 1903, some of which seem quite fanciful and hardly likely to arise; but however this may be, they cannot be permitted to affect the disposition of the question before us. In my opinion the statute is in all respects constitutional and the judgment should be affirmed, with costs.

Cullen, Ch. J., Gray, Edward T. Bartlett, Haight, Werner and Hiscock, JJ., concur.

Judgment affirmed.

105 Supreme Court of the United States.

AIDA T. RHODES, Plaintiff-Respondent,

v.

THE SPERRY AND HUTCHINSON COMPANY, Defendant-Appellant.

To the Honorable Justices of the Supreme Court of the United States:

Now comes The Sperry and Hutchinson Company, the above-named defendant-appellant, by its attorney, John Hall Jones, and presents its petition, and alleges that it is a corporation oragnized and existing under the laws of the State of New Jersey, and is engaged in business in the State of New York;

That in the above-entitled matter, on the 23rd day of October, 1908, final judgment was rendered against your petitioner by the Court of Appeals of the State of New York, that being the highest Court of Law or Equity in said State of New York, wherein it was adjudged that the provisions of Chapter 132 of the Laws of 1903 in and for the State of New York, (which made it unlawful for any person, firm or corporation to use for advertising purposes or purposes of trade, the name, portrait or picture of any living person, without having first obtained the written consent of such person, and which gave any person, whose name, portrait or picture is used within the State of New York for advertising purposes or for purposes of trade, without written consent first obtained, an equitable action in the Supreme Court of said State against the per-
106 son, firm or corporation so using such name, portrait or picture, to prevent and restrain the use thereof; and which statute further gave such person the right to sue and recover damages for any injuries sustained by such use, and to recover exemplary damages if such name, portrait or picture was used knowingly in such manner as was declared to be unlawful by said statute),—are not in conflict with the Constitution of the United States in that they impair the obligation of contracts and take property without due process of law and deprived defendant-appellant of liberty, all of which appears in the record, opinion and judgment in said Court of Appeals, whereby manifest error has happened to the great damage of your petitioner.

That on or about the 27th day of October, 1908, judgment was entered in the above-entitled matter in the Supreme Court of the State of New York, affirming said judgment of the Court of Appeals of the State of New York, and making the order and judgment of said Court, the order and judgment of the Supreme Court of the State of New York.

Wherefore, your petitioner prays for the allowance of a writ of error from the Supreme Court of the United States to the Supreme

Court of New York and the Judges thereof, to the end that the record in said matter may be removed into the Supreme Court of the United States, and the error complained of by your petitioner may be examined and corrected, and said judgment reversed; and your petitioner will ever pray.

Dated, Nov. 23, 1908.

THE SPERRY AND HUTCHINSON COMPANY,
By JOHN HALL JONES, *Its Attorney.*

Office & P. O. Address, 34 West 33rd Street, Borough of Manhattan.

107 [Endorsed:] Supreme Court of the United States. Aida T. Rhodes, Pl't'f-Resp., v. The Sperry & Hutchinson Company, Def't-App. Petition for writ of error, and assignment of errors. Attorney for Defendant-Appellant, John Hall Jones Counsellor at Law, No. 34 W. 33rd St., New York City.

108 Supreme Court of the United States.

AIDA T. RHODES, Plaintiff-Respondent,
against
SPERRY & HUTCHINSON COMPANY, Defendant-Appellant.

Know all men by these presents, That we, The Sperry & Hutchinson Company, a corporation under the laws of the State of New Jersey, as principal, and the National Surety Company, a corporation under the laws of the State of New York, as surety, are held and firmly bound unto Aida T. Rhodes in the sum of Two Thousand ($2,000.00) Dollars, to be paid to the said Aida T. Rhodes, her heirs, administrators, executors and assigns, to the payment of which, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 7th day of November, 1908.

Whereas, the above named defendant in error hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of New York.

Now, therefore, the condition of this obligation is such, that if the above named defendant in error shall prosecute this said writ of error to effect, and answer all costs and damages, if he shall fail to make good his plea, then this obligation shall be void; otherwise to be and remain in full force and virtue.

[L. S.] SPERRY & HUTCHINSON COMPANY,
By S. E. BAILEY, *Treasurer.*
NATIONAL SURETY COMPANY,
By ARTHUR P. WEST,
Resident Vice-President.

Attest:
WM. A. THOMPSON,
Assistant Secretary.

109 STATE OF NEW YORK,
County of New York, ss:

On the 9th of November, in the year 1908, before me personally came Samuel E. Bailey, to me known who being by me duly sworn did depose and say that he resides in Newark, N. J., that he is the Treasurer of the Sperry & Hutchinson Company, the corporation described in and who executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation; and that he signed his name thereto by like order.

JOHN HALL JONES,
Notary Public, New York Co., N. Y.

110 *Affidavit, Acknowledgment, and Justification by Guarantee or Surety Company.*

STATE OF NEW YORK,
County of New York, ss:

On this 7th day of November, one thousand nine hundred and eight, before me personally came Arthur P. West, known to me to be the Resident Vice-President of the National Surety Company, the corporation described in and which executed the within and foregoing Bond of Aida T. Rhodes vs. Sperry & Hutchinson Company as a surety thereon, and who, being by me duly sworn, did depose and say that he resides in the City of New York, State of New York; that he is the Resident Vice-President of said Company, and knows the corporate seal thereof; that the said National Surety Company is duly and legally incorporated under the laws of the State of New York; that said Company has complied with the provisions of the Act of Congress of August 13th, 1894; that the seal affixed to the within Bond of Aida T. Rhodes vs. Sperry & Hutchinson Company is the corporate seal of said Company, and was thereto affixed by order and authority of the Board of Directors of said Company, and that he signed his name thereto by like order and authority as Resident Vice-President of said Company, and that he is acquainted with Wm. A. Thompson and knows him to be the Assistant Secretary of said Company; and that the signature of said Wm. A. Thompson subscribed to said Bond is in the genuine handwriting of said Wm. A. Thompson, and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; and that the assets of said Company, unencumbered and liable to execution exceed its debts and liabilities of every nature whatsoever, by more than the sum of One million dollars.

That —— —— is our agent to acknowledge service in the Judicial District wherein this bond is given.

ARTHUR P. WEST.
(Deponent's Signature)

Sworn to, acknowledged before me, and subscribed in my presence this 7th day of November, 1908.

[L. S.] JOHN HOLMES,
(Officer's Signature, Description and Seal)
Notary Public, Queens Co.

Cert. filed in N. Y. Co.

Approved Nov. 27, 1908.

R. W. PECKHAM,
Asso. Just. S. C. U. S.

111 [Endorsed:] Copy of Bond. 44 Mc. 5300 B.

112 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of New York, upon a remittitur from the Court of Appeals of the State of New York before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Aida T. Rhodes, plaintiff, and The Sperry and Hutchinson Company, defendant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of
113 the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said defendant as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, by said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the

United States, the 27th day of November, in the year of our Lord one thousand nine hundred and eight.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

114 Supreme Court of the United States.

AIDA T. RHODES, Plaintiff-Respondent,
v.
THE SPERRY & HUTCHINSON COMPANY, Defendant-Appellant.

SUPREME COURT,
State of New York, ss:

I, Frank Ehlers, Clerk of said Court, do hereby certify that there was lodged with me as such Clerk, on December 22nd, 1908, in the case of Aida T. Rhodes v. The Sperry & Hutchinson Company,—

1. The original bond of which a copy is herein set forth.
2. Two copies of the writ of error, as herein set forth,—one for the defendant and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at my office in the Borough of Brooklyn, City of New York, this 22nd day of December, 1908.

[Seal Kings County.]

FRANK EHLERS,
Clerk of the Supreme Court of the State of New York, County of Kings.

115 UNITED STATES OF AMERICA, *ss:*

To Aida T. Rhodes, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of New York, wherein The Sperry and Hutchinson Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Rufus W. Peckham, Associate Justice of the Supreme Court of the United States, this 27 day of November, in the year of our Lord one thousand nine hundred and eight.

R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

116 On this 4th day of November, in the year of our Lord one thousand nine hundred and eight, personally appeared Harold J. Heist before me, the subscriber, and makes oath that he delivered a true copy of the within citation, the an-exed writ, and the original bond a copy of which is annexed hereto, to Aida T. Rhodes at #44 MacDonough street Brooklyn New York.

HAROLD J. HEIST.

Sworn to and subscribed the 4th day of November, A. D. 1908.

[Seal Ebenezer B. Wright, Notary Public, Kings County, N. Y. 30.]

E. B. WRIGHT,
Notary Public, Kings County, N. Y.

Registers Cert. No. 30.
Certificate filed in New York Co.
Commission Expires March 30th 1910.

117 Court of Appeals.

STATE OF NEW YORK, *ss:*

Pleas in the Court of Appeals Held at the Capitol, in the City of Albany, on the 23rd Day of October, in the Year of our Lord, One Thousand Nine Hundred and Eight, Before the Judges of said Court.

Witness, The Hon. Edgar M. Cullen, Chief Judge presiding; W. H. Shankland, Clerk.

Remittitur, October 24th, 1908.

AIDA T. RHODES, Respondent,
ag'st
THE SPERRY AND HUTCHINSON COMPANY, Appellant.

Be it remembered, That on the 19th day of September, in the year of our Lord, one thousand nine hundred and seven The Sperry and Hutchinson Company, the appellant in this action, came here into the Court of Appeals, by John Hall Jones, its attorney, and filed in the said Court a Notice of Appeal and return thereto from the Judgment of the Appellate Division of the Supreme Court in and for the Second Judicial Department.

And Aida T. Rhodes, the respondent in said action afterwards appeared in said Court of Appeals by Thomas E. O'Brien,
118 her attorney.

Which said Notice of Appeal and the return thereto filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Leonard Hand of counsel for the appellant and by Mr. Thomas E. O'Brien, of counsel for the respondent, and after due de-

liberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court, appealed from in this action, be in all things affirmed, And it was further ordered and adjudged that the respondent recover against the appellant costs of appeal to this Court.

Briefs Submitted for Intervenors.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be in all things affirmed, with costs as aforesaid, and stand in full force, strength and effect.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by them given in the premises, are by the said Court of Appeals, remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

R. M. BARBER,
Deputy Clerk of the Court of Appeals of the State of New York.

119 COURT OF APPEALS, CLERK'S OFFICE,
ALBANY, *October 24th*, 1908.

I hereby certify, that the preceding record contains a correct transcript of the proceedings in said action in the Court of Appeals, with the papers originally filed therein, attached thereto.

[SEAL.] R. M. BARBER,
Deputy Clerk.

O. K. A. B. A.

STATE OF NEW YORK,
County of Kings, ss:

I, Frank Ehlers, Clerk of the County of Kings, and Clerk of the Supreme Court of the State of New York in and for said County, (said Court being a Court of Record,) do hereby certify that I have compared the annexed with the original Remittitur filed in my office Oct. 27, 1908 and that the same is a true transcript thereof, and of the whole of such original.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said County and Court, this 30 day of Dec. 1908.

[Seal Kings County.]

FRANK EHLERS, *Clerk.*

[Endorsed:] 10-27-1908.

120 Supreme Court, Kings County.

AIDA T. RHODES, Plaintiff,
v.
THE SPERRY & HUTCHINSON COMPANY, Defendant.

Return to Writ.

SUPREME COURT OF THE STATE OF NEW YORK,
Kings County ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the seal of said Supreme Court of the State of New York, in the Borough of Brooklyn, County of Kings, this December 22, 1908.

[Seal Kings County.]

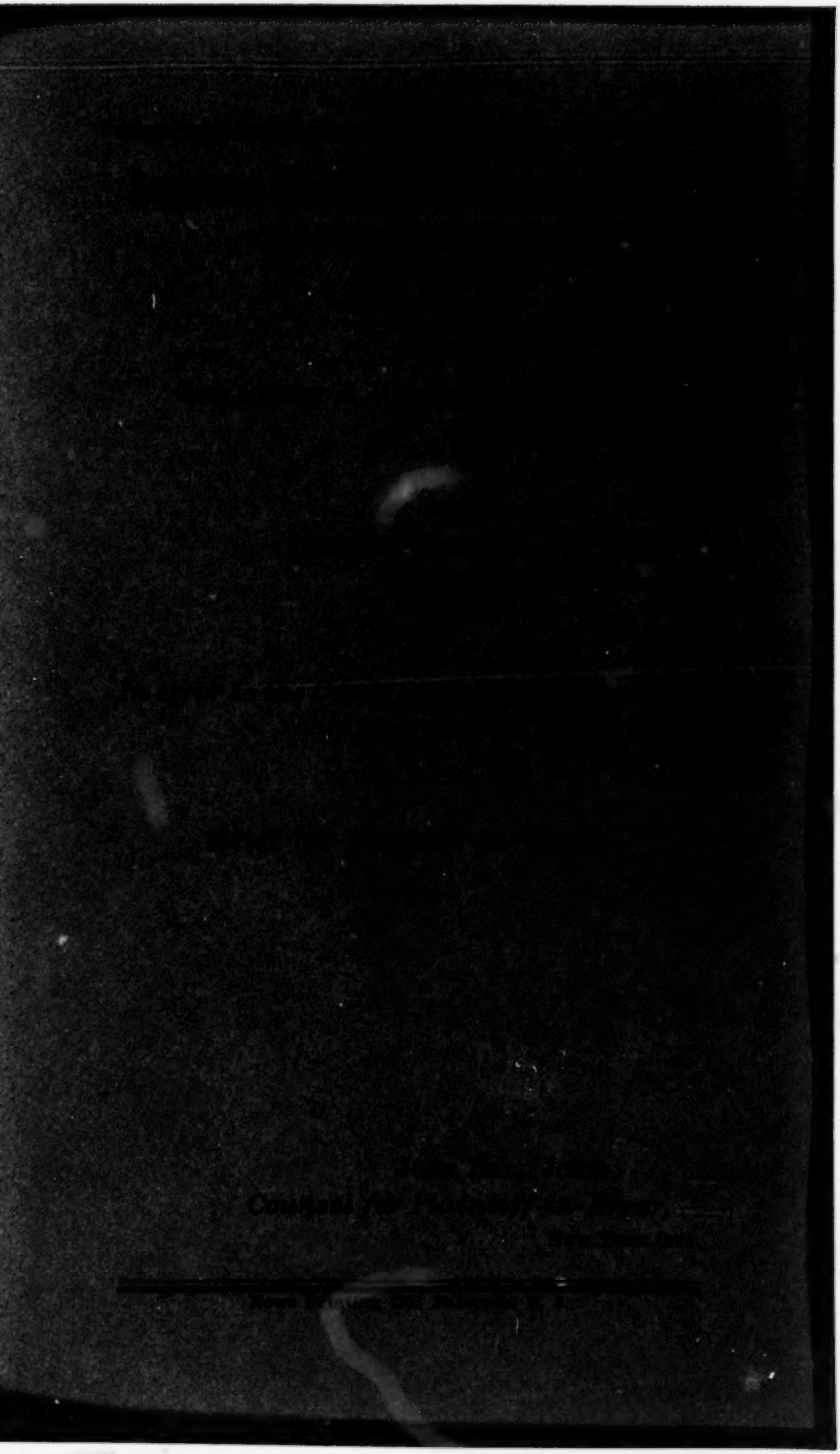
FRANK EHLERS,
Clerk of the Supreme Court of the State of New York, County of Kings.

Plaintiff's costs $609.69.

[Seal Kings County.]

FRANK EHLERS,
Clerk of the Supreme Court of the State of New York, County of Kings.

Endorsed on cover: File No. 21,469. New York Supreme Court. Term No. 128. The Sperry and Hutchinson Company, plaintiff in error, vs. Aida T. Rhodes. Filed January 6th, 1909. File No. 21,469.



Supreme Court of the United States.

OCTOBER TERM, 1910.
No. 128.

THE SPERRY & HUTCHINSON COMPANY,
Plaintiff-in-Error,

vs.

AIDA T. RHODES,
Defendant-in-Error.

Brief for Plaintiff in Error.

STATEMENT.

This case comes before the Court upon a writ of error to the Court of Appeals of the State of New York, allowed by the Hon. R. W. Peckham, late Associate Justice of the Supreme Court of the United States, on November 27, 1908.

The question at issue is the constitutionality of Chapter 132 of the Laws of New York of 1903, which is as follows:

"AN ACT TO PREVENT THE UNAUTHORIZED USE OF THE NAME OR PICTURE OF ANY PERSON FOR THE PURPOSES OF TRADE. (IN EFFECT APRIL 1, 1903).

"Section 1. A person, firm or corporation that uses for advertising purposes or for purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person or, if a minor, of his or her parent or guardian, is guilty of a misdemeanor.

"Section 2. Any person whose name, picture or portrait is used within this State for advertising purposes or for the purposes of trade without the written consent first obtained as above provided, may maintain an equitable action in the Supreme Court of this State against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof, and may also sue and recover damages for any injuries sustained by reason of such use, and if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by this act, the jury in its discretion may award exemplary damages.

"Section 3. This act shall take effect September 1st, 1903."

FACTS.

It appears from the record that Mrs. Rhodes, defendant-in-error, on June 11, 1904, had her photograph taken by Sol. Young, a photographer who had various studios in the City of New York, in the Borough of Brooklyn, and in the Borough of Manhattan. Mrs. Rhodes posed for her photograph in one of the Brooklyn studios.

Plaintiff-in-error is engaged in the business of advertising merchants by furnishing them with redeemable coupons or vouchers commonly known as Green Trading Stamps. It maintains a store on West 23d Street, Borough of Manhattan, New York City, stocked with goods, wares and merchandise, with which to redeem said Trading Stamps when presented by the customers of the merchants whom it advertises. In 1904, Sol. Young made "a contractual arrangement with The Sperry & Hutchinson Company by which he was permitted to display photographs" in the store of the plaintiff-in-error. (Rec. fol. 32). For a certain number of its Green Trading Stamps plaintiff-in-error offered an order upon Sol. Young for one dozen cabinet photographs. (Rec. fol. 59).

Young brought to said store about forty photographs of different persons, which he had taken, and placed them in a wall case 5½ by 8 feet in size, "to show and display the class of work he does." (Rec. fol. 31). Among these was a photograph of Mrs. Rhodes. In the wall case was a cardboard sign 27½ inches wide by 22½ inches high, upon which was printed the following:

"Sol. Young,
Photographer.
Studios:
Broadway,
Corner 15th Street, N. Y.
597-599 Fulton Street,
Brooklyn.
1204 Broadway,
Between 29th and 30th Streets, N. Y."

(Rec. fol. 78).

Young brought to said store other photographs besides those in the wall case, among which were two of Mrs. Rhodes. These were placed upon a glass counter in the store.

Mrs. Rhodes saw these photographs of herself in the store of plaintiff-in-error and commenced an action for an injunction. At the trial it appeared that objections had been made to the exhibition of her photograph in the store of plaintiff-in-error, and the photographs on the counter had been removed and her photograph in the wall case had been covered by another (Rec. fol. 57). Apparently a picture which was pinned over that of Mrs. Rhodes fell off (Rec. fol. 56), and the photograph of Mrs. Rhodes remained exposed in the wall case.

Judgment for injunction was entered for defendant-in-error, with an allowance of five per cent. on whatever amount the damages would be assessed at. The damages were assessed by a jury at $1,000. On appeal, the Justice writing the opinion in the Appellate Division recommended a reduction to $300, in

which his brethren did not concur. (Rec. fol. 91). The Court of Appeals affirmed the judgment below. (Rec. fol. 99).

ASSIGNMENT OF ERRORS.

Plaintiff-in-error respectfully submits that the Court of Appeals of New York erred in this:

(1) The Court erred in holding that the statute in question does not deprive any person of property without due process of law.

(2) The Court erred in holding the statute within the police power of the State.

ARGUMENT.

To understand the first error alleged, it is necessary to consider the law as it was in New York before the enactment of the statute. The Court of Appeals had decided in the case of *Roberson v. Rochester Folding Box Co.*, 171 N. Y., 538, that a woman had no right at common law to prevent a company from distributing flour bags upon which was a lithograph picture of herself. The decision is absolutely inconsistent with any claim that a person who voluntarily or involuntarily has his photograph taken has any right whatever in the photograph or the negative, or the film, except as such right arises under contract. Under that decision no person could maintain an action for breach of his so-called "right of privacy." The Court held that there was no such right under the law. It exploded the alleged distinction between public and private

characters in respect to privacy, and pointed out that the law of libel sufficiently protected the public. Under that decision no person in New York has any property right in his own features, nor in the photographs of them, and any person could take a photograph of another and use it as he chose—for advertising or trade purposes if he wished. That this is the effect of the decision cannot be doubted. It cleared up the vague and illogical mists that had formed about the subject, and made it clear that the photographs made by a photographer being the work of his hands, created by him with his own materials, became absolutely and incontestably his own property. *Atkinson v. Doherty,* 121 Mich. 372, is on all fours with the Roberson case.

The statute in this case was enacted soon after Judge Parker rendered the decision in the *Roberson* case. It must be noted that this statute does not in terms affect the property right of a photographer in his work. It merely says that one who uses the photograph of a living person for purposes of trade or advertising without that person's prior written consent is guilty of a crime. In other words, in the light of the *Roberson* case, one who uses his own property for trade or advertising purposes is a criminal, if that property is a photograph of a living person who has not previously consented in writing to such use.

It restricts and limits the property right in such a way as to destroy much of the value of the photograph, especially to a photographer or one who desires to increase the demand for

the work of a certain photographer by exhibiting specimens of his work.

Whether Young or plaintiff-in-error used the photograph in the store is not material. If the plaintiff-in-error used them, it was with the knowledge and consent of Young, their owner. The principles involved require this case to be decided as if Young, the photographer, were the original defendant, and were exhibiting his own work to increase the demand for his services.

The photographs in this case then, being WHOLLY the property of Young, the defendant-in-error had no property right or other legal right in them. She had only a *sentimental interest,* such as a model might have in a statue or painting for which she posed, or such as a person might have in a character in a novel for which she furnished the original suggestion. But the statute says that such a person although devoid of any but a sentimental interest in it may prevent the owner of the photograph from using it for trade or advertising purposes. Is it not pertinent to ask, "What is there about trade or advertising in a commercial country like ours rendering them so sacred or so ignoble that it must be made a crime to use one's own property in connection with them?"

Under the decision and the statute the owner may use the photographs to give away as presents, or may use them to decorate his walls; he may show them to his friends as curiosities, or he may use them to illustrate a lecture on clothes,—all without fear of arrest or injunction; but when he shows them as

samples of his work (Rec. fol. 34), for the purpose of earning a livelihood, he becomes a criminal unless he has the prior written consent of the sitter.

Such a law is an unnecessary deprivation of property. Although partial deprivation, it is of that which makes the property valuable, for it is foolish to say, "You may use your property in any way except in such a way that you may get a profit out of it. You may not sell it, or use it to increase your business. Even if it is a rejected picture you have taken months to paint, or a photograph in which your skill and labor are shown to advantage, you must not use it for trade or advertising, you must not sell it or barter it, nor make a profit on your own handiwork."

This is not a case where the law may be defended by quoting "*Sic utere tuo ut alienum non laedas,*" for the "other" has no legal right which you are bound to respect. The implied contract theory not to use the photograph was exploded in the *Roberson* case; detinue or replevin or larceny would not lie, because there is not a shred of "property" in the sitter, who never had any, and cannot lose what she never had. She ordered certain photographs of herself at a certain price, and received all she paid for, and that ended the matter. If she so desired she could have made a contract limiting the use to be made of any photographs she sat for. But for the purposes of this case we must leave out of account that she voluntarily sat for her photograph, and must consider the case as that of a person whose photograph is taken without any consent or even knowledge,

for the statute clearly covers such a case.

Suppose that an artist paints a picture containing several of his friends, and sells it to a collector who becomes bankrupt. The trustee sells it to a dealer, who has thousands of small engravings made of it for general sale. These certainly are his property. Can it be said he is not deprived of his property without due process of law, when one of the original sitters secures an injunction against the sale? One of Alma-Tadema's famous pictures of a Roman festival entitled "Spring" contains, among many others, a picture of George Henschel, the musician. Engravings of this picture are in every large picture shop in the world. Would not the dealers be astounded to be told they must not sell these valuable pictures because of the statute in question? Pictures of the Justices of this Court adorn the walls of hundreds of law offices. Some persons make a living by making and selling them in New York City. Are they criminals, and subject to injunction? These pictures are certainly used for purposes of trade.

Again, the statute prohibits the use of a living person's *name* for purposes of trade, thereby making it a crime for an employee to advertise "J. B. late with Tiffany"; and for an engraver to exhibit samples of visiting cards he has made in various styles. The salesman can no longer tell a prospective customer that Mr. A. has bought similar goods, or show Mr. A.'s signature to a letter acknowledging delivery. The law takes no account of "that liberty of action which is necessary in the conduct of modern business affairs in a great city."

(*Grossman v. Caminez,* 79 App. Div., N. Y., 15), but makes even the oral use of a person's name a crime.

It is submitted that every newspaper uses the names and portraits that appear daily in its pages for "purposes of trade"; they are there to sell the paper, increase circulation, enlarge advertising value and thereby increase income. If they did not do this, they would not be used. If this is not use for "purposes of trade," then the use of the photographs in this case is not such use. *The statute makes such use a crime.* Who would claim that such use of names and pictures could be prohibited under the police power?

Does it not come down to this, that the individual must admit certain rights by the public in his name and appearance, and must trust to advancing standards of propriety to prevent annoyance from their exercise.

In *Forster v. Scott,* 136 N. Y., 577, at page 584, the Court said:

> "What the Legislature cannot do directly, it cannot do indirectly, as the Constitution guards as effectually against insidious approaches as an open and direct attack. Whenever a law deprives the owner of the beneficial use and free enjoyment of his property, or imposes restraints upon such use and enjoyment, that materially affect its value, without legal process or compensation, it deprives him of his property within the meaning of the Constitution."

It is one of the fundamental principles of constitutional law that unconstitutionality does not depend upon what *has been* done under a particular statute but what *may be* done.

> "The legislative determination as to what is a proper exercise of the police power is subject to the supervision of the Court, and in determining the validity of an act it is its duty to consider not only what had been done under the law in a particular instance, but what may be done under and by virtue of its authority."
>
> *Fisher Co. v. Woods,* 187 N. Y., 90, 95.

> "In determining whether a statute is constitutional, the question is not whether the result is harmful in a particular case, but whether the statute according to its terms will violate the provisions of the Constitution in its application to cases which may be expected to arise."
>
> *Dexter v. Boston,* 176 Mass., 247, 251.

The Court is respectfully asked to apply this statute to the case of a photographer who buys out another's stock in trade, pictures, lenses, etc.

> "From what has been thus said it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretence of regulating fares and freights the State cannot require a railroad corporation to

carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation or without due process of law."

R. R. Cases, 116 U. S., 307, 331. (Cited in *Cotting v. Kansas City Stockyards Co.,* 183 U. S., 79, 86).

"Every partial or private law, which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences is unconstitutional and void."

VanZant v. Waddell, 2 Yerger, 260, 270.

See also

Livestock Ass'n. v. Crescent City Co., 1 Abbott, C. C., 388, 398.
Powell v. Pennsylvania, 127 U. S., 678, 692.
Lawton v. Steele, 152 U. S., 133, 137.
Wright v. Hart, 182 N. Y., 330.

"The direct and necessary result of a statute must be taken into consideration when deciding as to its validity, even if that result is not in so many words either enacted or distinctly provided for. In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect.

Collins v. New Hampshire, 171 U. S., 30.

In *Matter of Jacobs,* 98 N. Y., 98, the "tenement house cigar" case, the Court said:

"In the unceasing struggle for success and existence which pervades all societies

> of men, he may be deprived of that which will enable him to maintain his hold, and to survive" (p. 104).

The Court held that the statute deprived the plaintiff of his property without due process of law, saying (p. 105):

> "Property may be destroyed, or its value may be annihilated; it is owned and kept for some useful purpose and it has no value unless it can be used. Its capability for enjoyment and adaptability to some use are essential characteristics and attributes without which property cannot be conceived; and hence any law which destroys it or its value, or takes away any of its essential attributes, deprives the owner of his property.
>
> "The constitutional guaranty would be of little worth, if the Legislature could, without compensation, destroy property or its value, deprive the owner of its use, deny him the right to live in his own house, or to work at any lawful trade therein."

The Court cites with approval two preceding leading cases, as follows:

> "In *Wynehamer v. People,* (13 N. Y., 378, 398), Comstock, J., says: 'When a law annihilates the value of property and strips it of its attributes, by which alone it is distinguished as property, the owner is deprived of it according to the plainest interpretation, and certainly within the constitutional provision intended expressly to shield personal rights from the

exercise of arbitrary power.' In *People v. Otis* (90 N. Y., 48), Andrews, J., says: 'Depriving an owner of property or one of its attributes is depriving him of his property within the constitutional provision.'" * * *

"Liberty, in its broad sense as understood in this country, means the right, not only of freedom from actual servitude, imprisonment or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation. All laws, therefore, which impair or trammel these rights, which limit one in his choice of a trade or profession, or confine him to work or live in a specified locality, or exclude him from his own house, or restrain his otherwise lawful movements (except as such laws may be passed in the exercise by the Legislature of the police power, which will be noticed later), are infringements upon his fundamental rights of liberty, which are under constitutional protection" (pp. 106-107).

"But under the pretense of prescribing a police regulation, the State cannot be permitted to encroach upon any of the just rights of the citizen which the Constitution intended to secure against abridgement" (p. 109).

A case very much in point is *City of St. Louis v. Dorr*, 41 S. W., 1094, where an act was held unconstitutional which declared that no owner of property fronting on a boulevard might use it for trade purposes. The Court held that the

"use" of property was "property" within the meaning of the Constitution.

II.

The Court erred in holding the statute has any reasonable or proper relation to the public health, safety or morals.

When a person chooses to live in organized society he necessarily gives up certain claims to personal immunity from contact with others which he might make if he lived on a desert island. He may, perhaps, if he chooses, wear a mask; but if he does not, he cannot object to be stared at. It may be impertinent and annoying to have others stare or copy one's style of dress, but the public use, as one may say, of one's features, one's dress, one's name, gives the public a certain right therein. These things are in the nature of public property. The exterior of one's house in its appearance is public property; and there is as much logic is asserting that no one should use a picture of another's horse or barn for advertising a harness or a special roofing, as in saying no one should use the name or portrait of a living person for purposes of trade.

If the statute had said no one should use the *property* of another person for trade or advertising without consent of the owner, it would be unobjectionable because it would be a protection to property; but it is submitted that this statute if construed to create under New York law in one person a right of property in the property of another, does so with-

out compensation or due process of law. The laws of libel and slander sufficiently protect the character and reputation, and this Court has gone no further than that. See *Peck v. Chicago Sunday Tribune,* 214 U. S., 185.

This statute *does* prevent a person from using his own property in carrying on a lawful business, and unless such prevention is reasonably necessary the act violates the Fourteenth Amendment.

The inventions of the phonograph and "moving pictures" are among the greatest of modern times. Let us suppose a great public speaker like Mr. Roosevelt is addressing a convention, and that both of these inventions are employed to reproduce the speech and the audience so that the whole world may see and hear. The speech is printed in the newspapers, but when announced to be given in a theatre, Mr. Roosevelt gets an injunction against the use of his name, and two or three hundred of the audience enjoin the use of their picture for advertising or trade purposes, and get judgment for $1,000 each. Or, take a moving picture showing a crowded street or a ball game. This statute gives every person in the street or at the game a right to prevent the exhibition. While he could not prevent each one looking at him in public, under the statute he can prevent a reduplication of the scene. In other words, he has greater rights at one time than at another, and greater rights against some persons than against others. Historical events, pageants, inaugurations, may be thus handicapped, and a serious limitation placed upon the progress

of science, because no one will invent or develop such inventions if deprived of their commercial advantages.

In *Edison v. Lubin,* 122 Fed., 240 (C. C. A.), and in *American Mutoscope Co. v. Edison Mfg. Co.,* 137 Fed., 262, it was held that a series of moving pictures could be copyrighted by the one taking the photographs,—which presupposes a right of property in the photographer and negatives such a right in the subject.

There can be no question in this case of libelous use of the photographs. They merely told the truth; they were original and genuine, and were used only to illustrate the kind of work done by the photographer. (Rec. fol. 31).

It is clear that this statute can only be sustained if it is a valid exercise of the police power of the State. While the limits of this power can never be accurately defined, it is submitted that it extends only to such subjects as promote or guard the public *health,* the public *safety* or the public *morals.*

In the case of *O'Keefe v. Somerville,* 190 Mass., 110, at page 114, the Supreme Court of Massachusetts said:

> "The restrictions upon conduct which may be imposed in the exercise of the police power include everything that may be necessary in the interest of the PUBLIC HEALTH, THE PUBLIC SAFETY, OR THE PUBLIC MORALS and they include nothing more."

In *Young v. Commonwealth,* 101 Va., 853, at page 863, the Court said:

> "It has been repeatedly held that the only authority which a State or municipality has for enacting legislation of this character grows out of what is known as its 'police power.' This has been generally defined to be that power which a State or municipality has to enact laws or ordinances which pertain to the public safety, the public health, or the public morals. The proposition above stated is so universally recognized that it does not require the citation of authorities. It follows, therefore, that, unless the statute in question is one which in some way provides for the public safety, pertains to the public health, or concerns the public morals, it is not a valid exercise of the police power."

In *People v. Gillson,* 109 N. Y., 389, the Court adopted the process of elimination and, after showing that the statute in question had no direct or indirect relation to the public health, the public safety or the public morals, held the law unconstitutional.

In *People v. Zimmerman,* 102 App. Div. 103, the Court reviewed the New York decisions concerning statutes which interfered with private business and said, at page 105:

> "It is not a novel expedient for the Legislature to interfere with trade. The pretext for this kind of legislation is that the PUBLIC HEALTH and PUBLIC MORALS will be conserved thereby."

The Court reviewed *People v. Marx,* 99 N. Y., 377; *Matter of Jacobs,* 98 N. Y., 98; *People v. Beattie,* 96 App. Div., 383; *Buffalo v. Collins Baking*

Co., 39 App. Div., 432, and went on to say, at page 106:

> "We have referred to these authorities for the purpose of emphasizing the proposition that the constitutional provisions, insuring a person the largest liberty in his business if only it be lawful and not violative of the public welfare, are still maintained in their integrity."

Finally the Court emphasized the limitations upon the police power, at page 111, as follows:

> "The police power, while sufficiently comprehensive to meet most every exigency involving the PUBLIC HEALTH, SAFETY OR MORALS, is subsidiary to the Constitution. * * *
>
> "But it is also a landmark of our Constitution that the individual is permitted to engage in any lawful pursuit in a legitimate and honorable manner, and he is above interference even by the Legislature if he keeps within the limits suggested."

It will be found upon examination that every valid exercise of the police power has been upon a subject falling within one or other of these classes, or within that other well-known class business affected with a public interest.

That the police power is thus limited the following citations will show:

> "It belongs to that department to exert

what are known as the police powers of the State, and to determine, primarily, what measures are appropriate or needful for the protection of PUBLIC MORALS, THE PUBLIC HEALTH, OR THE PUBLIC SAFETY."

Mugler v. Kansas, 123 U. S., 623, 661 (1887).

"The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the HEALTH, THE MORALS, OR THE SAFETY of the public," etc.

Ibid., p. 669.

"The extent and limits of what is known as the 'police power' have been a fruitful subject of discussion in the Appellate Courts of nearly every State in the Union. It is universally conceded to include everything essential to the public SAFETY, HEALTH and MORALS, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance."

Lawton v. Steele, 152 U. S., 133, 136 (1894).

"It is not within the power of the general assembly, under the pretence of exercising the police power of the State, to enact laws not necessary to the preservation of the health and safety of the community that will be oppressive and burdensome upon the citizen."

Toledo, etc., Railway Company v. Jacksonville, 67 Ill., 37, 40 (1873).

"Thus it is perfectly competent to legislate concerning married women, minors, insane persons, bankers, common carriers, and the like; and the power of the Legislature to prescribe police regulations applicable to localities and classes is very great, because such laws are designed to protect property, and the SAFETY, HEALTH and MORALS of the citizen."

State v. Loomis, 115 Mo., 307, 313 (1893).

"We see nothing in such a stamp or coupon which is outside of the constitutional right of citizens to make contracts concerning property; nothing which wrongfully interferes with the lawful rights of other persons; and nothing which the police power can reach as touching the public SAFETY, the public HEALTH, or the public MORALS."

Ex parte Drexel and Holland, 147 Cal., 763, 767.

"But for all practical purposes, the police power of the State may be shortly defined to be the power of the Legislature to make such regulations relating to personal and property rights as look to the PUBLIC HEALTH, PUBLIC SAFETY AND PUBLIC MORALS."

State v. Dalton, 22 R. I., 77, 80.

The plaintiff-in-error contends that this statute is unconstitutional because it unreasonably interferes with the private business or art of photography and imposes unusual

restrictions upon it. The unconstitutionality of a statute does not depend upon what has been done under it, but what may be done, and under this statute a photographer may not exhibit his own work in his own studio without written consent.

The decision in *Fisher v. Woods*, 187 N. Y., 90, is directly in accord with appellant's contention. This case held unconstitutional a statute which provided in effect that

> "* * * any person who shall offer for sale any real property without the written authority of the owner of such property, or of his attorney in fact appointed in writing * * * shall be guilty of a misdemeanor."

The Court said:

> "* * * If, therefore, the Legislature, in the exercise of its police powers, may by this act lawfully make it a misdemeanor for a person to render services, * * * it may also provide that a lawyer should be guilty of a misdemeanor for drawing a contract for a client, or for rendering him any other service without having authority therefor in writing. It would also be competent to place like restrictions upon every employee in every trade and occupation. It is difficult to see how there could be any limitation to the power of the Legislature in this direction. To our minds this is going too far. It is an arbitrary infringement upon the liberty and rights of all persons who choose to engage in such occupation. * * *

> It relates, as we have seen, to any and every person, and instead of making the oral contract void it makes the person employed guilty of a misdemeanor and punishable as a criminal. Undoubtedly the power of the Legislature to enact what shall amount to a crime is exceedingly large, but, as was said by Peckham, J., in *People, &c., v. Gillson* (*supra*): 'That there is a limit even to that power under our Constitution we entertain no doubt, and we think that limit has been reached and passed in the act under review.' So we conclude with reference to it."

This language can be applied word for word in the case at bar, which presents a further element that besides making the exhibition by a photographer of a person's photograph a misdemeanor it also subjects him to suits in which exemplary damages may be recovered.

SUMMARIZING—Counsel for plaintiff-in-error contends:

1. That the photographs in question were the property of the photographer, of which he was making lawful use to promote his business.

2. That such use was not for advertising purposes or purposes of trade in the proper construction of the statute.

3. If it is held that the photographs were used for advertising purposes or purposes of trade, such purposes are lawful, and the

statute therefore deprives persons of liberty and property without due process of law, and is in restraint of trade.

4. That the statute does not fall within the police power of the State, inasmuch as the use of photographs for purposes of trade and advertising does not affect the health, safety or morals of the public.

It is respectfully submitted that the decision of the Court of Appeals of New York should be reversed.

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Memorandum of Recent Cases.

It may be of interest to the Court to note a few decisions and comments subsequent to the decision of the Court of Appeals of New York in this case.

Ellis v. Hurst, 121 N. Y., Supp. 438, (March 1, 1910).

Plaintiff was the author of two stories not copyrighted, but published several years before under an assumed name. Defendant republished these stories under the true name of plaintiff. An injunction was granted restraining the use of plaintiff's name. The Court said:

> "The act of the defendants in printing the plaintiff's name upon the publications referred to, was a use of the plaintiff's name for the purpose of trade. It was evidently placed upon the publication by the defendants because, in their opinion, its presence upon these books would facilitate their sale. I do not think that it can be seriously questioned that the plaintiff's name is being used by the defendants for a trade purpose."

Apparently this case went on to trial, and the decision of the Court is reported in the N. Y. Law Journal, December 27, 1910. Judgment was given for defendants, the Court saying:

> "The nom de plume of an author is but the synonym of his true name and, as was said in the "Mark Twain" case (supra) at page 731, "the invention of a nom de

plume gives the writer no increase of right over another who uses his own name" in the absence of a copyright. In publishing the plaintiff's name on the volumes under consideration the defendants published a truthful statement, directly connected with the authorship of the books, which they had a right to print."

In *Eliot v. Circle Publishing Co.,* 120 N. Y., Supp. 989. The Ex-President of Harvard University obtained an injunction restraining a publisher from advertising "Doctor Eliot's Famous Five Foot Shelf of the World's Greatest Books," although it appears that defendant had the right to print the books, and the description in the title was truthful.

In *Cundy v. Leverill,* an English case, referred to in N. Y. Law Journal, June 10, 1908, an injunction was refused against a tradesman advertising "From Poole's," and in commenting thereon the Law Journal says that the New York Statute would cover such a case.

Binns v. Vitagraph Co. of America, 67 Misc. 327. An injunction was granted restraining the use of the picture of plaintiff in a moving picture show. The Court held such use was for advertising purposes because intended to amuse rather than to instruct the general public.

The New York Law Journal in a note on this decision points out that a photograph used in a moving picture show is a work of art and the subject of a copyright, citing *Edison v. Lubin,* 122 Fed. 240; and *American Mutoscope & Biograph Co. v. Edison Mfg. Co.,* 137 Fed. 262. The Law Journal suggests that "trade is very commonly incidentally involved in a dissemination of literary or representations of dramatic or scenic productions"; and further

says "if there be a literary or dramatic or artistic interest outside of the complainant's personality, it is doubtful whether the law would apply."

Jeffries v. New York Evening Journal Publishing Co., 124 N. Y. Supp. 780 (May 1910). Plaintiff's picture was being published in defendant's newspaper without plaintiff's consent in connection with the biography of plaintiff as a pugilist. He sought an injunction, which was refused, on the ground "a picture is not used for advertising purposes, unless the picture is part of an advertisement, while "trade" refers to commerce or traffic, not to the dissemination of information."

Plaintiff in this case alleged that his picture gave the newspaper an increased circulation, and thereby increased value as an advertising medium. The Court said this stretches the language of the statute *ad absurdum*.

In *Moser v. Press Pub. Co.*, 109 N. Y. Supp. 963, an injunction was refused because a newspaper published the picture of plaintiff, on the ground that the publication was not likely to recur.

In *Riddle v. McFadden*, 130 App. Div., (N. Y.) 898 (Feb. 1909) an injunction was granted in a suit for an injunction and $15,000 damages for printing the picture of plaintiff without her consent in the "Physical Culture Magazine."

Post cards illustrating imaginary scenes in the life of the plaintiff, including views of herself, were published and sold without her consent and against her objections. She applied for an injunction to restrain the sale of the post cards. *Held*, that the plaintiff has established no right to restrain the publication.

Corelli v. Wall, 22 T. L. R. 532 (Eng., Ch. D., May 10, 1906).

The English law has refused to restrain the unauthorized use of a name for advertising. *Dockrell v. Dougall*, 78 L. T. 840. But the right of a private person to restrain the unauthorized publication of a portrait of himself has been left undetermined. See *Monson v. Tussauds*, [1894] 1 Q. B. 671. The present decision, however, seems to settle the English law for the present against allowing such restraint.

In *Wyatt v. James McCreery & Co.*, 126 App. Div. (N. Y.) 650 (June 1908). Plaintiff, an infant, by guardian, sued a photographer for exhibiting plaintiff's photograph without the guardian's consent. The statute was held to apply to such a case and plaintiff had judgment for $5,000.

It is very evident that these decisions are inconsistent. Under some the truth may be told, even though it involves the use of a name or picture; under others the truth must be suppressed. The last case referred to shows that even a photographer may not exhibit samples of his work, without the consent of the guardian of an infant plaintiff. It is difficult to see the difference between printing a picture in a newspaper and printing it in a magazine; using a name on a book, as an author, and using a name on a book as a compiler; using a picture in a moving picture show or using the picture in a million newspapers.

The distinction suggested between literary or dramatic interests and commercial interests, would seem difficult to apply; it is as thin as the distinction between public and private characters in respect to their right of privacy, which was long ago exploded.

Argued by
Thomas E. O'Brien,
32 Nassau Street,
New York.

Supreme Court of the United States.

THE SPERRY & HUTCHINSON COMPANY,
Plaintiff-in-Error,

against

AIDA T. RHODES,
Defendant-in-Error.

BRIEF OF DEFENDANT-IN-ERROR.

This cause is here on Writ of Error to the Supreme Court of the State of New York.

Facts.

In June, 1904, Mrs. Rhodes, the plaintiff in the State Court, sat for her photograph at the studio of one Sol Young in Brooklyn, selected the poses she desired furnished, ordered six photographs, and paid for them (p. 15). The photographer subsequently made an arrangement with the

Sperry & Hutchinson Company, a trading stamp concern, to take photographs for collectors of its stamps and furnished photographs of Mrs. Rhodes to the company for exhibition as types or styles obtainable for its stamps (pp. 16 and 17). Mrs. Rhodes objected to this use of her photographs, and when the company persisted in exhibiting them after being notified that the exhibition was distasteful and annoying to her, brought suit for an injunction and damages (p. 24).

Proceedings in State Court.

The action for an injunction and damages was brought on for trial at Special Term in December, 1905 (p. 14). The Court found for Mrs. Rhodes on all the issues involving her right to an injunction (p. 11) and granted her an interlocutory judgment which directed an assessment of damages at Trial Term and the entry of final judgment after such assessment, enjoining the future use of the photographs and allowing her a recovery of the amount to be so assessed (p. 12). The Sperry & Hutchinson Company appealed from this interlocutory judgment to the Appellate Division, and in July, 1906, that judgment was unanimously affirmed by that Court, without opinion (114 App. Div., 920). Thereafter the damages were assessed at Trial Term at $1,000 and final judgment was entered in November, 1906, in conformity with the terms of the interlocutory judgment. From this judgment also the Sperry & Hutchinson Company appealed to the Appellate Division (p. 3), and this judgment also was *unanimously* affirmed (p. 44). The company then appealed to the Court of Appeals from the judgment affirming the *final* judgment, but the notice of ap-

peal did not mention the interlocutory judgment (p. 2).

Before the case came on for argument in the Court of Appeals, Helen Wyatt and James McCreery & Company, plaintiff and defendant, respectively, in an action in the State Supreme Court involving similar facts, were allowed to file briefs (193 N. Y., 223, 226), upon the question of the constitutionality of Chapter 132 of the New York Session Laws of 1903, which specifically authorized relief by way of injunction and damages in cases of the wrongful use of photographs for advertising purposes. In that case the constitutional question had been raised by demurrer and the statute had been sustained (126 App. Div. 650).

Counsel does not hesitate to assert that it was solely because of the intervention of these strangers to the present litigation that the Court of Appeals in its opinion assumed to discuss the statute at all.

As will be later shown, the Court of Appeals had no jurisdiction whatever to pass upon the constitutionality of that statute in this action, but the fact remains that although the appeal taken was merely an appeal from the judgment of the Appellate Division affirming the *final* judgment entered November 30, 1906 (p. 44) and that the judgment of the Appellate Division was a judgment of *unanimous* affirmance (p. 53), the opinion of the Court discussed the constitutionality of the statute, and in terms directed an affirmance of the final judgment, and judgment of affirmance was accordingly entered (pp. 49 and 50). As counsel understands, the Sperry & Hutchinson Company then applied to Chief Judge Cullen of the Court of Appeals for the allowance of a writ of error to secure a review by this Court of the constitutional ques-

tion discussed in the opinion, but the application was denied. Associate Justice Peckham of this Court, however, granted a writ and execution upon the state court judgment has been stayed pending this Court's decision (p. 58).

Defendant-in-error now moves for a dismissal of the appeal or an affirmance of the judgment.

POINTS.

I. This Court has no jurisdiction over the cause.

II. Assuming jurisdiction in this Court to pass upon the constitutional question urged by the plaintiff-in-error, this Court should hold that the question has been properly decided.

III. Assuming jurisdiction in this Court and a wrong decision of the constitutional question in the state court, the judgment should be affirmed.

IV. Whether the appeal is dismissed or the judgment is affirmed, this Court should award 10% damages for delay.

I.

This Court is without jurisdiction.

The only so-called "federal question" urged by the plaintiff-in-error is the constitutionality of Chapter 132 of the New York Session Laws of 1903 (now Sections 50 and 51 of the New York Civil Rights Law), which reads as follows:

> AN ACT to prevent the unauthorized use of the name or picture of any person for the purposes of trade.

Became a law, April 6, 1903, with the approval of the Governor. Passed, a majority being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.

Section 2. Any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the Supreme Court of this state against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use, and if the defendant shall have knowingly used such person's name, portrait, or picture in such manner as is forbidden or declared to be unlawful by this act, the jury, in its discretion, may award exemplary damages.

Section 3. This act shall take effect September 1, 1903.

Under Section 709 of the United States Revised Statutes there are three conditions precedent to review by this Court of a judgment founded on a State Statute:

1. The question of the validity of the statute under the constitution of the United States must have been *specially* raised in the state courts.

Kansas Endowment Assn. v. Kansas, 120 U. S. 103.

2. The question must have been raised by a party within the class injuriously affected.

Southern Ry. Co. v. King, 217 U. S. 524.

3. The question must have been necessarily decided by the highest state court in which a decision on the question could be had.

Citizens Bank v. Board of Liquidation, 98 U. S. 140.

Eustis v. Bolles, 150 U. S. 361, 366.

California Powder Works v. Davis, 151 U. S. 389, 393.

Arkansas Southern R. R. Co. v. Germania Nat'l Bank, 207 U. S. 270, 277.

The question was not specially raised.

"If a party intends to invoke for the protection of his rights, the constitution of the United States * * * he must so declare; and unless he does so declare specially,—that is, unmistakably,—this court is without authority to re-examine the final judgment of the state court. This statutory requirement is not met if such declaration is so general in its character that the purpose to assert a federal right is left to mere inference."

Harlan, J., in Oxley Stave Co. v. Butler Co., 166 U. S. 648, 655.

In the case at bar, the record is absolutely barren of reference to any claim by the plaintiff-in-error that the statute was repugnant to the federal constitution.

Every portion of the record which can possibly be distorted into a claim that the statute is invalid for any reason whatever, is set out below:

In the answer: (p. 6.)

> "Chapter 132 of the Laws of 1903 * * * is unconstitutional and void as being in restraint of trade, commerce and competition and as depriving defendant without due process of law of the liberty to engage in a lawful business."

In the conclusion of law proposed by the plaintiff-in-error: (p. 10)

> "Chapter 132 of the Laws of 1903 * * * is unconstitutional and void."

In the motion to dismiss, at the close of plaintiff's case: (p. 17)

> "I move for a dismissal of the complaint upon the ground that the plaintiff has no right of privacy under the decision of Roberson against the Rochester Folding Box Company."

In the motion to dismiss, at the close of the whole case: (p. 18)

> "I * * * move that the cause of action be dismissed."

On the assessment of damages, at the close of the plaintiff's proof: (p. 26)

> "I move to dismiss the action for damages on the ground that the plaintiff has shown absolutely no damages."

On the assessment of damages, at the close of all the proofs: (p. 34)

> "I move to dismiss * * * on the * * * ground that the plaintiff has shown no damage which is cognizable in law."

On the assessment for damages on the coming in of the verdict: (p. 37)

> "I move to set aside the verdict * * *

> upon all the grounds set forth in Section 999 of the Code."

Section 999 of the N. Y. Code of Civil Procedure, to which counsel referred, reads as follows:

> "The Judge presiding at a Trial by a jury may in his discretion entertain a motion made upon his minutes at the same term, to set aside the verdict or a direction dismissing the complaint and grant a new trial upon exceptions; or because the verdict is for excessive or insufficient damages, or otherwise contrary to the evidence, or contrary to law."

It will be noted that in the above extracts from the record, the remarks made by counsel for the plaintiff-in-error must be most liberally interpreted in order to discover the slightest suggestion of a claim that no cause of action existed. It would certainly seem that it would be a contradiction in terms to say that *by inference* he had "specially set up or claimed" a right under the federal constitution.

If the plaintiff-in-error did not see fit to raise the federal question by demurring to the complaint, it should at least have raised the question by a motion to dismiss at the opening of the trial. No such motion was made.

The stipulation with regard to dispensing with the printing of the photographs, (p. 38) shows that no federal question whatever was in mind of counsel for the plaintiff-in-error at that time; and no review by this Court of any of the questions in this action was anticipated. The stipulation is limited to appeals in the state court.

The mere general objection that the statute is "unconstitutional and void" or the statement of any other ground of objection available under the state constitution is insufficient.

Kansas Endowment Assn. v. Kansas, 120 U. S. 103.

While it may be conceded that this court may look into the opinion of the Court of Appeals to determine the nature of a decision sought to be reviewed, if a federal question has been properly, that is, specially or unmistakably, raised, this may not be done where the question appears to have been raised for the first time in the Court of Appeals.

Arkansas S. R. R. Co. v. Germania Bank, 207 U. S. 270, 276.

The right of review of this court is limited to cases where the federal question arose in the court of original jurisdiction.

Mr. Chief Justice Waite says in *Spies v. Illinois*, 123 U. S. 131 at 181, (cited with approval in *Jacoby v. Alabama*, 187 U. S. 133 at p. 136) in speaking with regard to the highest court of another state:

> "As the Supreme Court of the state was reviewing the decision of the trial court, it must appear that the claim was made in that court, because the Supreme Court was only authorized to review the judgment for errors committed there; and we can do no more * * * If the right was not set up or claimed in the proper court below, the judgment of the highest court of the state in the action is conclusive, so far as the right of review here is concerned."

The plaintiff-in-error is not within the class whose constitutional rights are affected.

The only federal question discussed in the opinion of the Court of Appeals, the sole source of such a question in this case, is the validity of the statute

from the standpoint of Article 1, Section 10 of the Federal Constitution. Does the statute impair the obligation of contracts? (p. 53)

The statute was passed in 1903. There was no contract in existence at that time with reference to plaintiff's photograph. The photograph itself was not taken until June, 1904, (p. 15) and there was never any contract in existence with reference thereto to which the plaintiff-in-error was a party.

Even if such a contract obligation had been in existence at the time the statute was passed, the trend of the Court of Appeals opinion is to show that the statute is entirely prospective and does not affect existing contracts.

That construction by the highest state court on a statute of that state is binding on this court.

Standard Oil Co. v. Tennessee, 217 U. S. 413.

The question was not necessarily decided by the highest court in the state in which a decision could be had.

First—As to the necessity of the decision sought to be reviewed.

The appeal to the Court of Appeals from the judgment of the Appellate Division affirming the *final* judgment granting an injunction and a money recovery, did not bring up any question as to the constitutionality of the statute. An interlocutory judgment declaring the defendant-in-error entitled to an injunction and a money recovery (leaving the amount to be fixed by subsequent proceedings,) established the law of the case as between the parties. The Court of Appeals had jurisdiction to review the interlocutory judgment on an appeal from the final judgment only in the event that the inter-

locutory judgment was also specified in the notice of appeal as being brought up for review.

N. Y. Code of Civil Procedure § 1316.

By failing to specify the interlocutory judgment in the notice of appeal to the Court of Appeals, plaintiff-in-error elected to abide by it and its appeal from the final judgment brought up for review merely the proceedings after the interlocutory judgment, that is, the assessment of damages.

N. Y. Code of Civil Procedure §1350.
Rich v. Manhattan Ry. Co., 150 N. Y. 542.
Waldo v. Schmidt, 198 N. Y. 193.

The affirmance by the Court of Appeals shows conclusively that there was no reversible error on the assessment of damages and that ground alone was sufficient to support the affirmance. No question of the validity of the statute was before the court and its remarks on that subject were *obiter*.

The interlocutory judgment was an independent judgment and precluded the Court of Appeals and this Court from considering "the questions that were put at rest between the parties" by that judgment.

Chouteau v. Gibson, 111 U. S. 200, 201.

Second—As to the highest court in which a decision could be had.

The above discussion of the effect of a failure to appeal from the interlocutory judgment is on the assumption that the final judgment was appealable to the Court of Appeals. But not even that judgment has been legally reviewed by the Court of Appeals, and of course, if no such legal review has been had, no federal question was necessarily decided by the Court of Appeals.

The judgment of the Appellate Division *unanimously* affirmed the final judgment (pp. 44 and 45), and the Court of Appeals in its statement preliminary to the opinion recognizes the affirmance as such.

> "The final judgment * * * has been unanimously affirmed by the Appellate Division." (p. 53)

A unanimous affirmance in the Appellate Division of a judgment in an action to recover damages for a personal injury precludes an appeal to the Court of Appeals unless the appeal is allowed by the Appellate Division or a Judge of the Court of Appeals.

> N. Y. Code of Civil Procedure, § 191 sub. 2.

This is an action to recover damages for a personal injury.

> Riddle v. McFadden, N. Y. Law Journal, March 23, 1911.
> (Opinion in full in appendix to this brief.)

No leave was obtained in the present case.

Where an appeal to a higher court may be had by leave, and no effective appeal has been taken to that court, this Court has no jurisdiction unless the record shows that leave to appeal was applied for and refused.

> Fisher v. Perkins, 122 U. S. 522;
> Mullen v. Western Union Beef Co., 173 U. S. 116.

There was no legal and effective review by the highest state court in which a decision could be

had. All the proceedings in the Court of Appeals were extra-jurisdictional and void, and this Court has no jurisdiction to review its decision.

II.

The statute is constitutional.

It would be a work of supererogation to argue in support of the constitutionality of Chapter 132 of of the Laws of 1903, when such a conclusive refutation of all arguments to the contrary is contained in the opinion of Judge Bartlett, which forms a part of the record (p. 32).

III.

Assuming the unconstitutionality of the statute, judgment should be affirmed.

Even though the statute may be unconstitutional and this Court has jurisdiction to so declare, the judgment must be affirmed if there is any other ground on which it may be supported.

Murdock v. Memphis, 20 Wall. 590.

> "Why should a judgment be reversed for an error in deciding the federal question, if the same judgment must be rendered on the other points in the case? And why should this Court reverse a judgment which is right on the whole record presented to us or where the same judgment will be rendered by the court below after they have corrected the error on the federal question?" MILLER, J.—in Murdock v. Memphis, 20 Wall. 590, 634.

There is a very broad general ground upon which the judgment may be supported independent of the statute and independent of the interlocutory judgment which has never been reviewed.

The Defendant-in-Error Has a Right of Action at Common Law.

Plaintiff engaged the photographer, sat for her pictures, and paid for them. Out of that contract for hiring between the sitter and the photographer, a property right arises which the line of cases reviewed in *Roberson v. Rochester Folding Box Company* (171 N. Y. 538) recognizes. Even the New York Court of Appeals itself, though denying injunctive relief on the facts before it in the Roberson case, recognized the property right existing in the defendant-in-error in the present case, for Judge Gray in his dissenting opinion, assumed to speak for the whole court when he said: (at page 564)

> "The right would be conceded if she had sat for her photograph."

The existence of such a right is generally recognized.

> Pavesich v. N. E. Life Ins. Co., 122 Ga. 190.
> Levyeau v. Clements, 175 Mass. 376.
> Corliss v. Walker Co., 64 Fed. Rep. 280.

In the *Levyeau* case (175 Mass. 376) defendant, who was in the marble business, engaged the plaintiff, an engraver, to make some cuts or dies from drawings and photographs made by defendant and to print 5000 copies from the cuts or dies. Plaintiff had 5080 copies made, intending to use the extra 80 as samples of his work. By mistake

the whole 5080 were sent to the defendant; in the action for the conversion of the 80, the court held that the plaintiff could not recover, for the reason that either the prints were the property of the defendant, or at any rate, it was a violation of the plaintiff's contract with the defendant and a breach of confidence for plaintiff to have the extra 80 dies made. The Court cites with approval:

> Morrison v. Moat, 9 Hare, 241.
> Prince Albert v. Strange, 2 DeG. S. M. 262.
> Tuck v. Priester, 19 Q. B. D.
> Pollard v. Photographic Co., 40 Ch. Div. 245.

In the *Corliss* case (64 Fed. Rep. 281) the Court uses the following language:

> "When a person engages a photographer to take his pictures, agreeing to pay so much for the copies which he desires, the transaction assumes the form of a contract; and it is a breach of contract as well as a violation of confidence for the photographer to make additional copies from the negative. The negative may belong to the photographer, but the right to print additional copies is the right of the customer."

It is true that the Court at Special Term was guided by the statute in determining on the procedure, but the procedure adopted differed in no wise from the procedure the court was authorized to follow in enforcing the common law remedy.

A jury trial of the issue of damages was within the discretion of the trial court.

The wanton and malicious character of the act justified the imposition of exemplary damages, even though the only actual damage consisted of mental suffering.

Preiser v. Weiland, 48 A. D. 569.
Gillespie v. Brooklyn Heights R. R., 178 N. Y. 347.
Fry v. Bennett, 9 Abb. 45; 28 N. Y. 324.
Gold v. Bissell, 1 Wend. 210.

It will be seen therefore, that while the statute guided the procedure adopted, the relief obtained was not dependent on the existence of the statute.

Though the statute be regarded as unconstitutional in so far as it grants a right to injunction and damages for the use of a photograph, however obtained, it can hardly be urged that it may not be sustained as a statute governing procedure in cases where a remedy lay at common law.

Citizens Nat'l Bank v. Kentucky, 217 U. S. 443.

IV.

On either a dismissal of the appeal or an affirmance of the judgment, the defendant-in-error should be awarded ten per cent. damages for delay.

In the foregoing points it has been shown that no federal question was specially or properly raised in this case; that the Court of Appeals had no jurisdiction to review either the interlocutory judgment or the final judgment, and therefore no jurisdiction to interject into the record of this case for the first time any federal question; that if such federal question were properly in the record an appeal to this court would be frivolous for the rea-

son that the plaintiff-in-error is not in the class entitled to raise the question, and for the further reason that the statute is manifestly constitutional, and that even assuming the jurisdiction of this Court and the unconstitutionality of the statute, the judgment should be affirmed.

The defendant-in-error received a verdict of $1000 and the argument of this appeal is the last step in a series of dilatory and ineffective attempts on the part of the plaintiff-in-error to withhold from the defendant-in-error the relief found due her.

Before a decision can be expected in this Court, nearly six years will have expired since the action began and five years and a half will have expired since plaintiff obtained her first judgment.

Under all the circumstances it is respectfully submitted that damages for delay should be awarded to the defendant-in-error on all the judgments at the rate of ten per cent.

Texas and Pacific Ry. Co. v. Volk, 151 U. S. 73.
Watterson v. Payne, 154 U. S. 534.

April, 1911.

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APPENDIX.

Opinion in Riddle v. McFadden—New York Court of Appeals, March, 1911.

Felicite S. Riddle, Respondent, v. Bernarr A. MacFadden, Appellant, Impleaded with Luther S. White, Defendant. (Decided March 14, 1911.)

Appeal by the defendant, Bernarr A. MacFadden, from a judgment of the Appellate Division of the Supreme Court in the first department, entered on February 9, 1909, unanimously affirming a judgment upon a verdict in favor of the plaintiff rendered upon an assessment of damages at a Trial Term of the Supreme Court in New York County.

The appeal from the judgment coming on for argument the respondent moved to dismiss the appeal on the ground that the Court of Appeals has no jurisdiction to entertain the same in the absence of a certificate by the Appellate Division that in its opinion a question of law is involved which ought to be reviewed by the Court of Appeals under subdivision 2 of section 191 of the Code of Civil Procedure or without having obtained in lieu thereof an allowance of the appeal by a judge of this court.

Thomas E. O'Brien for motion.
Paris S. Russell opposed.

WILLARD BARTLETT, J. This action was brought for an injunction and to recover damages under chapter 132 of the Laws of 1903 entitled "An act to prevent the unauthorized use of the name or picture of any person for the purposes of trade."

The issues on which the plaintiff based her right to equitable relief were tried at Special Term where an interlocutory judgment was rendered in favor of the plaintiff awarding an injunction against the appellant and directing an assessment of damages before a jury at Trial Term. Upon such assessment the jury rendered a verdict for the plaintiff in the sum of $3,000. Final judgment was thereupon entered from which an appeal was taken to the Appellate Division where it was unanimously affirmed. A further appeal has now been taken to this court without the certificate from the Appellate Division provided for in subdivision 2 of section 191 of the Code of Civil Procedure or any allowance of the appeal by a judge of the Court of Appeals.

The respondent moved to dismiss on the ground that the suit is an action to recover damages for a personal injury and hence that such certificate or allowance is indispenable.

In disposing of this motion it should be noted that a stipulation appears in the record to the effect that the appeal in so far as it includes an appeal from the interlocutory judgment (which awarded the injunction) "be withdrawn and that the review on appeal be limited to the review of the questions presented upon the assessment of damages at trial term." This stipulation would limit us to a consideration of the strictly legal aspects of the case as distinguished from the plaintiff's right to equitable relief under the statute for the unauthorized invasion of her right of privacy.

We are of opinion that an action under chapter 132 of the Laws of 1903 (now sections 50 and 51 of the Civil Rights Law) in which the plaintiff seeks to recover damages is an action to recover

damages for a personal injury within the meaning of subdivision 2 of section 191 of the Code of Civil Procedure. In the long section of the Code containing miscellaneous general definitions and rules of construction we find the following definition of the term "personal injury": "A 'personal injury' includes libel, slander, criminal conversation, seduction, and malicious prosecution; also an assault, battery, false imprisonment, or other actionable injury to the person either of the plaintiff, or of another." (Code Civ. Pro. Sec. 3343, subd. 9.)

Independently of this statutory definition it is well settled that an injury to the person within the meaning of the law does not necessarily involve the element of personal contact with the person injured. The alienation of a husband's affections, the seduction of a man's daughter and the breach of a promise to marry are examples of personal injuries of this character. An action by a wife to recover damages for the alienation of her husband's affections was held to be an action for a personal injury in Bennett vs. Bennett (116 N. Y., 584). An action to recover damages for fraud by a defendant in inducing the plaintiff to marry him was declared to be an action for a personal wrong not affecting the plaintiff's property or estate, in Price vs. Price (75 N. Y., 244). The character of an action to recover damages for breach of promise of marriage came before this court for consideration in Wade vs. Kalbfleisch (58 N. Y., 282), where it was declared to be in substance an action on the case for personal injuries, although in form it resembles an action on contract. Evidence as to the wealth of the defendant is admitted in such actions, "not to prove the pecuniary loss of support, but to show what the station of the plaintiff in society

would have been, which is purely a personal grievance and injury." (Per Church, Ch. J.) "If its personal features are abandoned, the incidents only remain. The circumstances relative to the property and standing of the defendant are admissible upon the question of damages, but they are incidental and subordinate, and so complicated with personal injuries as to render their separation impracticable" (p. 286). In Maxson vs. Del. L. & W. R. R. Co. (112 N. Y., 559) this court held, speaking through GRAY, J., that an action by a husband to recover damages for the loss of the services of his wife because of personal injuries inflicted upon her by the defendant's negligence was an action for a personal injury and that it was not any the less an action for a personal injury, because of the fact that the injury had brought about a diminution of or loss to the husband's estate.

It is said in Cooley on Torts (3d ed. p. 364) that "the right of privacy, conceding it to exist, is a purely personal one, that is, it is a right of each individual to be let alone or not to be dragged into publicity." In the prevailing opinion in Roberson v. Rochester Folding Box Co. (171 N. Y. 538), holding that there was no common-law right of privacy, the implication is that equity cannot grant relief for the invasion of such a right if it exists because it is merely a personal right and not a property right; and in the dissenting opinion Judge Gray declared the right of privacy or the right of the individual to be let alone to be a personal right. There thus appears to have been no difference in the court as to the character of the right, assuming its existence, and it follows that if the right is personal its invasion must be a personal injury.

Referring to the implied permission which the act of 1903 gives to use the name, portrait or picture of another for advertising purposes or for the purposes of trade when the written consent of the person has first been obtained or if the person is a minor by permission of the parent or guardian, the appellant argues that it is absurd to say that the law will countenance and approve the act of a parent or guardian in consenting to the commission of a personal injury upon an infant. This is equivalent to saying that an act may not be denominated a personal injury which is entirely legal if done with the consent of the party affected thereby. The proposition overlooks the obvious point that the presence or absence of consent may be an element which characterizes an act as a personal injury or no injury at all. More than one class of cases may be suggested in which the lack of consent turns what would otherwise be an innocent act toward the person of another into an actionable personal wrong; as where a surgeon performs an operation upon an infant child without the consent of the parent or guardian, or where he makes an autopsy without the consent of those whose consent the law prescribes.

Under the act of 1903 it is possible, of course, for a person whose name or portrait has been used in violation of its prohibitions to maintain an equitable action as provided in the second section for an injunction only without seeking the recovery of pecuniary or exemplary damages. Such an equity suit, although based upon an injury to the person, would not be an action to recover damages for a personal injury. Where, however, as in the case at bar, there is in addition to the demand for equitable relief a demand for money damages which are as-

sessed by a jury, we think the action is one to recover damages for a personal injury within the purview of subdivision 2 of section 191 of the Code of Civil Procedure, and that where the judgment entered upon the verdict has been unanimously affirmed by the Appellate Division no appeal lies to this court unless it is allowed as provided for in that section.

For these reasons the motion to dismiss the appeal should be granted with costs.

Cullen, Ch. J., Gray, Werner, Hiscock, Chase and Collin, JJ., concur.

Appeal dismissed.

SPERRY AND HUTCHINSON COMPANY *v.* RHODES.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

No. 128. Argued April 19, 20, 1911, for plaintiff in error. The court declined to hear further argument.—Decided May 1, 1911.

The Fourteenth Amendment does not forbid statutes and statutory changes to have a beginning and thus to discriminate between rights of an earlier and later time.

In a statute relating to the use of photographs, the fact that it applies only to those taken after the enactment does not render it unconstitutional as denying the equal protection of the law because it does not relate to those taken prior to such enactment.

Where property is not brought into existence until after a statute is passed, the owner is not deprived of his property without due process of law on account of limitations thereon imposed by such statute.

The Court of Appeals of that State having construed the statute of New York of 1903 limiting the use of photographs of persons to photographs taken after the statute went into effect, the statute is not unconstitutional as denying one owning photographs taken thereafter of his property without due process of law, or as denying equal protection of the law.

Judgment entered on authority of 193 N. Y. 223, affirmed.

THE facts are stated in the opinion.

Mr. John Hall Jones for plaintiff in error:

As to the law in New York before the enactment, see *Roberson* v. *Rochester Folding Box Co.*, 171 N. Y. 538, holding there was no right at common law to prevent a company from distributing flour bags upon which was a lithograph picture of the plaintiff.

Under that decision no person in New York has any property right in his own features, nor in the photographs of them, and any person could take a photograph of another and use it as he chose; and see *Atkinson* v. *Doherty*, 121 Michigan, 372.

The statute in this case was enacted soon after Chief Judge Parker's decision in the *Roberson case*. It must be noted that this statute does not in terms affect the property right of a photographer in his work. It merely says that one who uses the photograph of a living person for purposes of trade or advertising without that person's prior written consent is guilty of a crime. In other words, the statute restricts and limits the property right in such a way as to destroy much of the value of the photograph.

It is an unnecessary deprivation of property; nor can the law be defended or the rule of "Sic utere tuo ut alienum non laedas," for the "other" has no legal right which you are bound to respect. The law takes no account of "that liberty of action which is necessary in the conduct of modern business affairs in a great city," *Grossman* v. *Caminez*, 79 App. Div. N. Y. 15, but makes even the oral use of a person's name a crime.

The individual must admit certain rights by the public in his name and appearance, and must trust to advancing standards of propriety to prevent annoyance from their exercise. *Forster* v. *Scott*, 136 N. Y. 577, 584.

Unconstitutionality does not depend upon what has been done under a particular statute but what may be done. *Fisher Co.* v. *Woods*, 187 N. Y. 90, 95; *Dexter* v. *Boston*, 176 Massachusetts, 247, 251; *Railroad Cases*, 116 U. S. 307, 331; *Cotting* v. *Kansas City Stockyards Co.*, 183 U. S. 79, 86; *Van Zandt* v. *Waddell*, 2 Yerger, 260, 270; *Livestock Assn.* v. *Crescent City Co.*, 1 Abbott, C. C. 388, 398; *Powell* v. *Pennsylvania*, 127 U. S. 678, 692; *Lawton* v. *Steele*, 152 U. S. 133, 137; *Wright* v. *Hart*, 182 N. Y. 330; *Collins* v. *New Hampshire*, 171 U. S. 30; *Matter of Jacobs*, 98 N. Y. 98; *Wynehamer* v. *People*, 13 N. Y. 378, 398; *St. Louis* v. *Dorr*, 41 S. W. Rep. 1094.

The statute has no reasonable or proper relation to the public health, safety or morals. *Peck* v. *Chicago Sunday Tribune*, 214 U. S. 185. The statute does prevent a per-

son from using his own property in carrying on a lawful business, and unless such prevention is reasonably necessary the act violates the Fourteenth Amendment. *Edison* v. *Lubin*, 122 Fed. Rep. 240; *American Mutoscope Co.* v. *Edison Mfg. Co.*, 137 Fed. Rep. 262.

This statute can only be sustained if it is a valid exercise of the police power of the State. While the limits of this power can never be accurately defined, it is submitted that it extends only to such subjects as promote or guard the public health, the public safety or the public morals. *O'Keefe* v. *Somerville*, 190 Massachusetts, 110; *Young* v. *Commonwealth*, 101 Virginia, 853, 863; *People* v. *Gillson*, 109 N. Y. 389; *People* v. *Zimmerman*, 102 App. Div. 103; *Mugler* v. *Kansas*, 123 U. S. 623, 661; *Lawton* v. *Steele*, 152 U. S. 133; *Toledo Railway Co.* v. *Jacksonville*, 67 Illinois, 37, 40; *State* v. *Loomis*, 115 Missouri, 307, 313; *Ex parte Drexel*, 147 California, 763; *State* v. *Dalton*, 22 R. I. 77, 80; *Fisher* v. *Woods*, 187 N. Y. 90.

For decisions and comments subsequent to the decision of the Court of Appeals of New York in this case, see *Ellis* v. *Hurst*, 121 N. Y. Supp. 438; *S. C.*, N. Y. Law Journal, Dec. 27, 1910; *Eliot* v. *Circle Publishing Co.*, 120 N. Y. Supp. 989; *Cundy* v. *Leverill*, referred to in N. Y. Law Journal, June 10, 1908; *Binns* v. *Vitagraph Co. of America*, 67 Misc. Rep. 327; *Jeffries* v. *N. Y. Evening Journal Publishing Co.*, 124 N. Y. Supp. 780; *Moser* v. *Press Pub. Co.*, 109 N. Y. Supp. 963; *Riddle* v. *McFadden*, 130 App. Div. (N. Y.) 898; *Corelli* v. *Wall*, 22 T. L. R. 532 (Eng. Ch. D., May 10, 1906); *Dockrell* v. *Dougall*, 78 L. T. 840; *Wyatt* v. *James McCreery & Co.*, 126 App. Div. (N. Y.) 650.

The court declined to hear further argument, but *Mr. Thomas E. O'Brien* filed a brief for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action brought by the defendant in error for

using her photographed portrait for advertising purposes without her written consent first obtained. The facts were found against the defendant (the plaintiff in error), an injunction was issued and damages were awarded; 120 App. Div. 467; the judgment was affirmed by the Court of Appeals, 193 N. Y. 223, and thereupon final judgment was entered in the Supreme Court. The suit was based upon Chapter 132 of the New York Statutes of 1903, which makes such use of the name, portrait or picture of any living person a misdemeanor and gives this action. The case comes here on the single question of the constitutionality of the act. It is argued that as before the statute a person could not prevent the use of her portrait by one who took and owned it, *Roberson* v. *Rochester Folding Box Co.*, 171 N. Y. 538, to deny that use now is to deprive the owner of his property without due process of law.

The Court of Appeals held that the statute applied only to photographs taken after it went into effect, as was the photograph of the plaintiff that the defendant used. The property was brought into existence under a law that limited the uses to be made of it, and, if otherwise there could have been any question, in such a case there is none. Some comment was made in argument on the distinction between photographs taken before and after the date in 1903 as inconsistent with the Fourteenth Amendment. But the Fourteenth Amendment does not forbid statutes and statutory changes to have a beginning and thus to discriminate between the rights of an earlier and later time.

Judgment affirmed.